

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

VOLUME I

JOINT APPENDIX

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,465

767

JOSEPH E. SEAGRAM & SONS, INC.
Appellant,
v.

HONORABLE DOUGLAS DILLON, ET AL.
Appellees.

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 13 1964

Nathan J. Paulson
CLERK

INDEX

	Page
Docket Entries.....	1A
Complaint.....	6A
Defendants' Motion To Dismiss, and Alternative Motion For Summary Judgment.....	16A
Defendants' Statement Pursuant To Local Rule 9(h)....	20A
Govt. Ex. 2.....	21A
Govt. Ex. 3.....	25A
Govt. Ex. 4.....	28A
Govt. Ex. 6.....	31A
Govt. Ex. 7.....	33A
Govt. Ex. 8.....	48A
Govt. Ex. 9.....	51A
Intervenors' Motion To Dismiss Or In The Alternative For Summary Judgment.....	56A
Intervenors' Statement Under Rule 9(h).....	57A
Order Granting Intervention.....	59A
Government Defendants' Motion To Quash And For Other Protective Order.....	60A
Order Staying Staying Plaintiff's Noticed Depositions..	63A
Affidavit of Edgar Bronfman In Opposition To Motions To Dismiss Or For Summary Judgment.....	63A
Affidavit of Fredick W. Klayer In Opposition To Motions To Dismiss Or For Summary Judgment.....	71A
Affidavit of Stuart L. Adams In Opposition To Motions To Dismiss Or For Summary Judgment.....	76A
Plaintiff's Statement of Genuine Issues Necessary To Be Litigated Pursuant to Rule 9(h).....	79A

	Page
Defendants' Motion To Strike Plaintiff's Affidavits An Attached Exhibits.....	86A
Memorandum Decision of the District Court.....	90A
Judgment.....	91A
Notice of Appeal.....	92A

JOINT APPENDIX

Docket Entries

CIVIL DOCKET

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Date Proceedings 263-63
1963

	Deposit for cost by	
Jan. 29	Complaint, appearance	filed
Jan. 29	Summons, copies (6) and copies (6) of Complaint issued. All ser 1-31-63; US Atty ser 2-5- Atty Gen ser 2-8-63;	
Apr. 2	Stipulation extending time for defts to answer to and including 5-6-63.	filed
May 10	Stipulation extending time for defts to answer to & including 5-16-63. (FIAT)	
		McGuire, C.J.
May 17	Stipulation extending time for deft to answer to & including 5-24-63. (FIAT) (N) Pine, J.	
May 23	Motion of defts to dismiss & alternative motion for summary judgment; app. David C. Acheson, Charles T. Duncan, Joseph M. Hannon & Gil Zimmerman; c/m 5-23-63; statement of material facts; P & A; exhibits Nos. 1-17; MC 5-23-63.	filed

2 A

Date 1963	Proceedings
May 27	Motion of National Distillers & Chemical Corp. Shenley Industries, Inc. & Stitzel-Weller Distillery, Inc. for leave to intervene as defts; app. of Whiteford, Hart, Carmody & Wilson & Cooke & Beneman & John D. McElroy; deposit by Strickler, \$5.00; c/m 5-24-63; exhibit "B" exhibit; P & A; exhibit (motion & statement); MC 5-27-63. filed
May 31	Stipulation extending time to respond to motion for leave to intervene to & including July 1, 1963 & the time to reply to motions to dismiss or for summary judgment to & including July 10, 1963. filed
July 1	Opposition of plttf to joint application of 3 of plttf's competitors for leave to intervene; c/m 7-1-63. filed
July 9	Stipulation extending time for plttf to respond to defts' motion for summary judgment to & including 8-12-63. filed
Aug. 7	Stipulation extending to and including 9-16-63 time for plttfs to respond to deft's motion to dismiss or for summary judgment. filed.
Sept. 5	Stipulation extending time for pltf to respond to deft's motion to dismiss or for summary judgment to 10-28-63. filed
Sept. 13	Reply of applicants to pltf's opposition to motion to intervene; c/m 9-13-63. filed
Oct. 3	Supplemental memorandum of pltf in opposition to motion to intervene; c/m 10-3-63. filed
Oct. 11	Notice by pltf to take deposition of intervenors; c/s 10-10-63. filed

3 A

Date	Proceedings
1963	
Oct. 11	Notice by pltf to take deposition of Dr. Alex P. Mathers; c/s 10-10-63. filed
Oct. 16	Motion of deft to quash and for other protective order; c/m 10-16-63; P&A; M.C. 10-16-63; appearance of David C. Acheson, Charles T. Duncan, Joseph M. Hannon and Gil Zimmerman. filed
Oct. 16	Order granting National Distillers and Chemical Corporation, Shenley Industries, Inc. and Stitzel-Weller Distillery, Inc. leave to intervene as party defts. (N) McGarraghy, J.
Oct. 17	Notice of hearing of motion; c/s 10-17-63. filed
Oct. 18	Motion of defts #5, 6, and #7 to quash taking deposition or for protective order; c/m 10-18-63; P&A. filed
Oct. 21	Memorandum of P&A of pltf in opposition to motions to quash and/or for protective order; c/s 10-21-63. filed
Oct. 25	Consent order fixing procedural dates; setting hearing on motion for summary judgment on Dec. 12, 1963 at 10:00 a.m. (N) McGarraghy, J.
Nov. 4	Reply of defts to pltf's opposition to motion to quash or for protective order; c/m 11-4-63. filed
Nov. 8	Order staying depositions noticed by pltf pending disposition of motions to dismiss or for summary judgment. (N) McGarraghy, J.

4 A

Date 1963	Proceedings
Nov. 20	Transcript of proceedings, 10-8-63, pp. 1-35. (Rep.-Ida Z. Watson. Court's copy.) filed
Nov. 27	Opposition of pltf to motion of defts and intervenors to dismiss and alternative motions for summary judgment; c/s 11-27-63; affidavit exhibits A through E; affidavits (2); exhibits F,G,H,I (4 small bottles). filed
Dec. 6	Motion of defts to strike pltf's affidavits and exhibits; c/m 12-6-63; M.C. 12-6-63. filed
Dec. 6	Points and authorities of defts in reply to pltf's opposition to motions to dismiss and alternative motions for summary judgment; c/m 12-6-63. filed
Dec. 6	Statement of pltf of genuine issues; c/m 12-6-63. filed
Dec. 12	Motion to dismiss and alternative motion for summary judgment argued and taken under advisement. McGarraghy, J.
Dec. 13	Opposition of pltf to defts' motion to strike pltf's affidavits and exhibits A thru H; c/m 12-13-63. filed
Dec. 26	Memorandum opinion granting defts' motions for summary judgment & granting defts' motion to strike pltf's affidavits & attached exhibits. (Signed Dec. 20, 1963) (N) McGarraghy, J.

5 A

Date	Proceedings
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1964

- | | |
|---------|--|
| Jan. 2 | Order granting defts' and intervenors' motions for summary judgment; granting defts' motion to strike pltf's affidavits and attached exhibits; declaring all other matters in the case to be moot and dismissing the action.
(N) McGarraghy, J. |
| Jan. 17 | Notice of appeal by pltf; copies mailed to David C. Acheson and Whiteford, Hart, Carmody and Wilson; deposit by Jones, \$5.00. filed |
| Jan. 29 | Cost bond on appeal of pltf in amount of \$250.00 with the Travelers Indemnity Co., approved and (fiat). Keech, J. |

[Filed January 29, 1963]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 263-63

JOSEPH E. SEAGRAM & SONS, INC., a corporation, d/b/a
Calvert Distilling Co., Washington Boulevard, Balti-
more, Md. (P. O. Box 208)

Plaintiff,

v.

HON. DOUGLAS DILLON, individually, and as Secretary of
the Treasury of the United States of America Treas-
ury Department, Washington 25, D. C.

HON. MORTIMER M. CAPLIN, individually and as Commis-
sioner of Internal Revenue, Department of the Treas-
ury, United States of America, Twelfth and Consti-
tution Avenue, N. W., Washington 25, D. C.

HON. DONALD W. BACON, individually and as Assistant
Commissioner (Compliance) of Internal Revenue,
Department of the Treasury, United States of America
Twelfth and Constitution Avenue, N. W., Washington
25, D. C.

HON. DWIGHT E. AVIS, individually and as Director of the
Alcohol and Tobacco Tax Division of the Internal
Revenue Service, Department of the Treasury, United
States of America Twelfth and Constitution Avenue,
N. W., Washington 25, D. C.

Defendants.

COMPLAINT

*(Suit for Declaratory Judgment, Injunction, and
to Annul and Suspend Final Action by the
Secretary of the Treasury)*

1. The Plaintiff, Joseph E. Seagram & Sons, Inc.,
d/b/a Calvert Distilling Co., is a corporation organized

and existing under the laws of the State of Indiana, which has offices on Washington Boulevard, Baltimore, Maryland. It is engaged in the business of distilling, blending and bottling alcoholic beverages for sale throughout the United States and elsewhere and is duly authorized under Federal and State laws to engage in such business. The amount in controversy exclusive of interest and costs exceeds ten thousand dollars (\$10,000), and this court has jurisdiction by virtue of the provisions of Title 11, Sections 305 and 306 of the District of Columbia Code, 1961 Edition, Title 27, Section 205(e) and Title 28, Sections 1331, 1332, 1651 and 2201, United States Code.

2. Defendant Dillon is the Secretary of the Treasury of the United States having his official residence in the District of Columbia. He is charged, *inter alia*, with the duty of administering the Internal Revenue Laws of the United States and of approving and promulgating all regulations issued pursuant to the Federal Alcohol Administration Act (27 U.S.C. Secs. 201-212; 49 Stat 977).

3. Defendant Caplin is the Commissioner of Internal Revenue having his official residence in the District of Columbia. He is charged, *inter alia*, with the duty of administering the Federal Alcohol Administration Act, and, subject to the approval of the Secretary of the Treasury, prescribing rules and regulations under such Act.

4. Defendant Bacon is Assistant Commissioner (Compliance) of Internal Revenue having his official residence in the District of Columbia. Subject to the supervision and direction of the Secretary of the Treasury and the Commissioner of Internal Revenue, he supervises, *inter alia*, the administering of the provisions of the Federal Alcohol Administration Act, including those dealing with the labeling and advertising of alcoholic beverages.

[Filed January 29, 1963]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 263-63

JOSEPH E. SEAGRAM & SONS, INC., a corporation, d/b/a
Calvert Distilling Co., Washington Boulevard, Balti-
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Plaintiff,

v.

HON. DOUGLAS DILLON, individually, and as Secretary of
the Treasury of the United States of America Treas-
ury Department, Washington 25, D. C.

HON. MORTIMER M. CAPLIN, individually and as Commis-
sioner of Internal Revenue, Department of the Treas-
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tution Avenue, N. W., Washington 25, D. C.

HON. DONALD W. BACON, individually and as Assistant
Commissioner (Compliance) of Internal Revenue,
Department of the Treasury, United States of America
Twelfth and Constitution Avenue, N. W., Washington
25, D. C.

HON. DWIGHT E. AVIS, individually and as Director of the
Alcohol and Tobacco Tax Division of the Internal
Revenue Service, Department of the Treasury, United
States of America Twelfth and Constitution Avenue,
N. W., Washington 25, D. C.

Defendants.

COMPLAINT

*(Suit for Declaratory Judgment, Injunction, and
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Secretary of the Treasury)*

1. The Plaintiff, Joseph E. Seagram & Sons, Inc.,
d/b/a Calvert Distilling Co., is a corporation organized

and existing under the laws of the State of Indiana, which has offices on Washington Boulevard, Baltimore, Maryland. It is engaged in the business of distilling, blending and bottling alcoholic beverages for sale throughout the United States and elsewhere and is duly authorized under Federal and State laws to engage in such business. The amount in controversy exclusive of interest and costs exceeds ten thousand dollars (\$10,000), and this court has jurisdiction by virtue of the provisions of Title 11, Sections 305 and 306 of the District of Columbia Code, 1961 Edition, Title 27, Section 205(e) and Title 28, Sections 1331, 1332, 1651 and 2201, United States Code.

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3. Defendant Caplin is the Commissioner of Internal Revenue having his official residence in the District of Columbia. He is charged, *inter alia*, with the duty of administering the Federal Alcohol Administration Act, and, subject to the approval of the Secretary of the Treasury, prescribing rules and regulations under such Act.

4. Defendant Bacon is Assistant Commissioner (Compliance) of Internal Revenue having his official residence in the District of Columbia. Subject to the supervision and direction of the Secretary of the Treasury and the Commissioner of Internal Revenue, he supervises, *inter alia*, the administering of the provisions of the Federal Alcohol Administration Act, including those dealing with the labeling and advertising of alcoholic beverages.

5. Defendant Avis is the Director of the Alcohol and Tobacco Tax Division of the Internal Revenue Service having his official residence in the District of Columbia. Subject to the supervision and direction of the Secretary of the Treasury, the Commissioner and Assistant Commissioner (Compliance) of Internal Revenue, he administers, *inter alia*, the provisions of the Federal Alcohol Administration Act, including those dealing with the labeling and advertising of alcoholic beverages.

6. The defendants are sued in both their individual and official capacities.

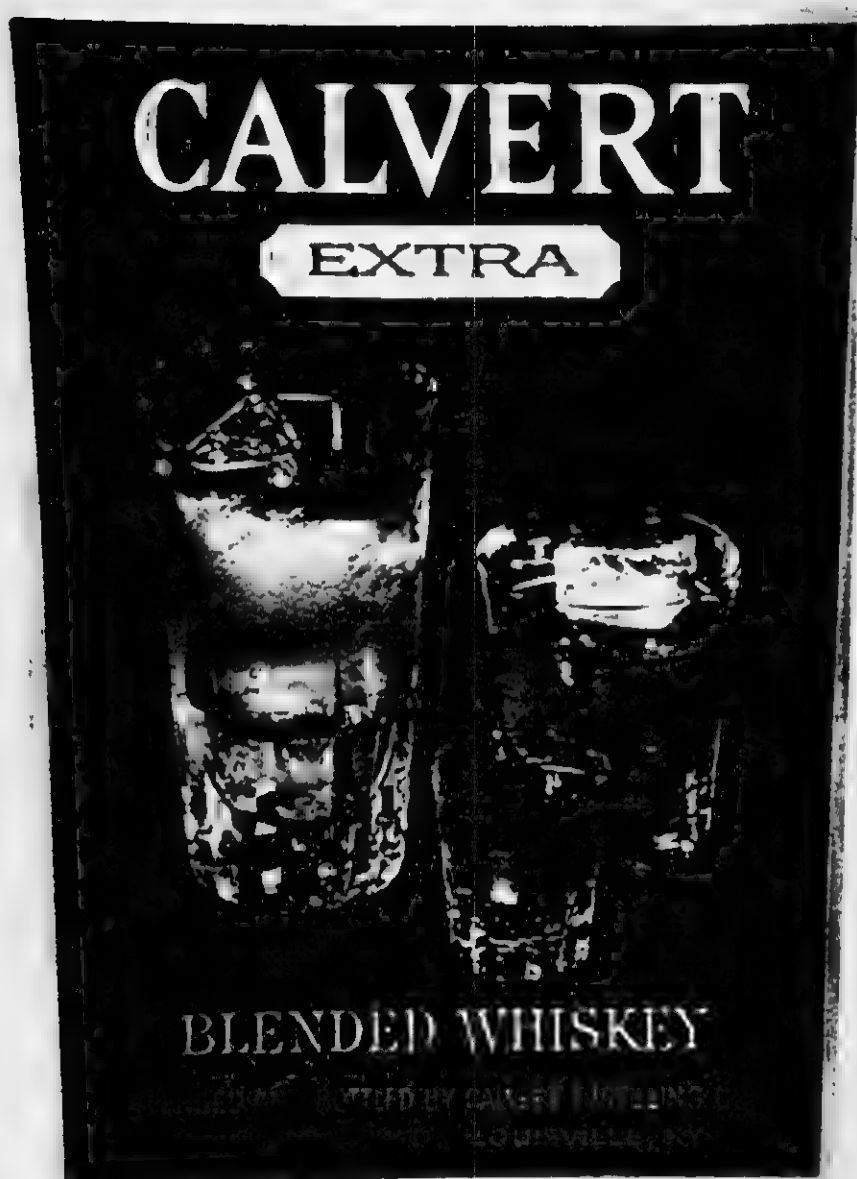
7. For more than four years last past plaintiff has been engaged in the special distillation and storage of certain grain neutral spirits. These grain neutral spirits were stored in specially selected used barrels (cooperage) which had been previously used for aging plaintiff's fine whiskies. The storage of plaintiff's specially distilled grain neutral spirits for at least four years in specially selected used cooperage resulted in grain neutral spirits whose chemical and physical properties and composition are substantially and demonstrably different from grain neutral spirits which have not been so distilled and stored and imparts unique, readily identifiable, and distinctively different taste, aroma and characteristics to such grain neutral spirits.

8. Plaintiff was also, simultaneously with the grain neutral spirits storage program outlined above, carrying on a program of aging fine whiskies. After the grain neutral spirits have been stored in the used cooperage as described above for a period of at least four years plaintiff has withdrawn and proposes to continue to withdraw them from storage and has blended and proposes to continue to blend them with its fine aged whiskies to produce a superior blended whiskey to be sold to the public under the name of "Calvert Extra". "Calvert Extra" was

designed to contain not less than twenty per cent (20%) by volume of 100 proof straight whiskey and not less than twenty per cent (20%) nor more than eighty (80%) by volume of plaintiff's above described specially distilled and stored grain neutral spirits.

9. On or about January 28, 1963, plaintiff filed an application with the Director of the Alcohol and Tobacco Tax Division for a Certificate of Label Approval, under the Federal Alcohol Administration Act, covering a set of labels for "Calvert Extra" Blended Whiskey, copies of which are affixed immediately hereafter:

FRONT LABEL



BACK LABEL

CALVERT EXTRA

Calvert Extra was begun years ago when these spirits and whiskies were put aside. The grain neutral spirits in this product contribute a unique, delightful taste of their own, the result of a special distillation process and of storage for at least four years in specially selected used cooperage barrels which were previously used for aging our fine whiskies.

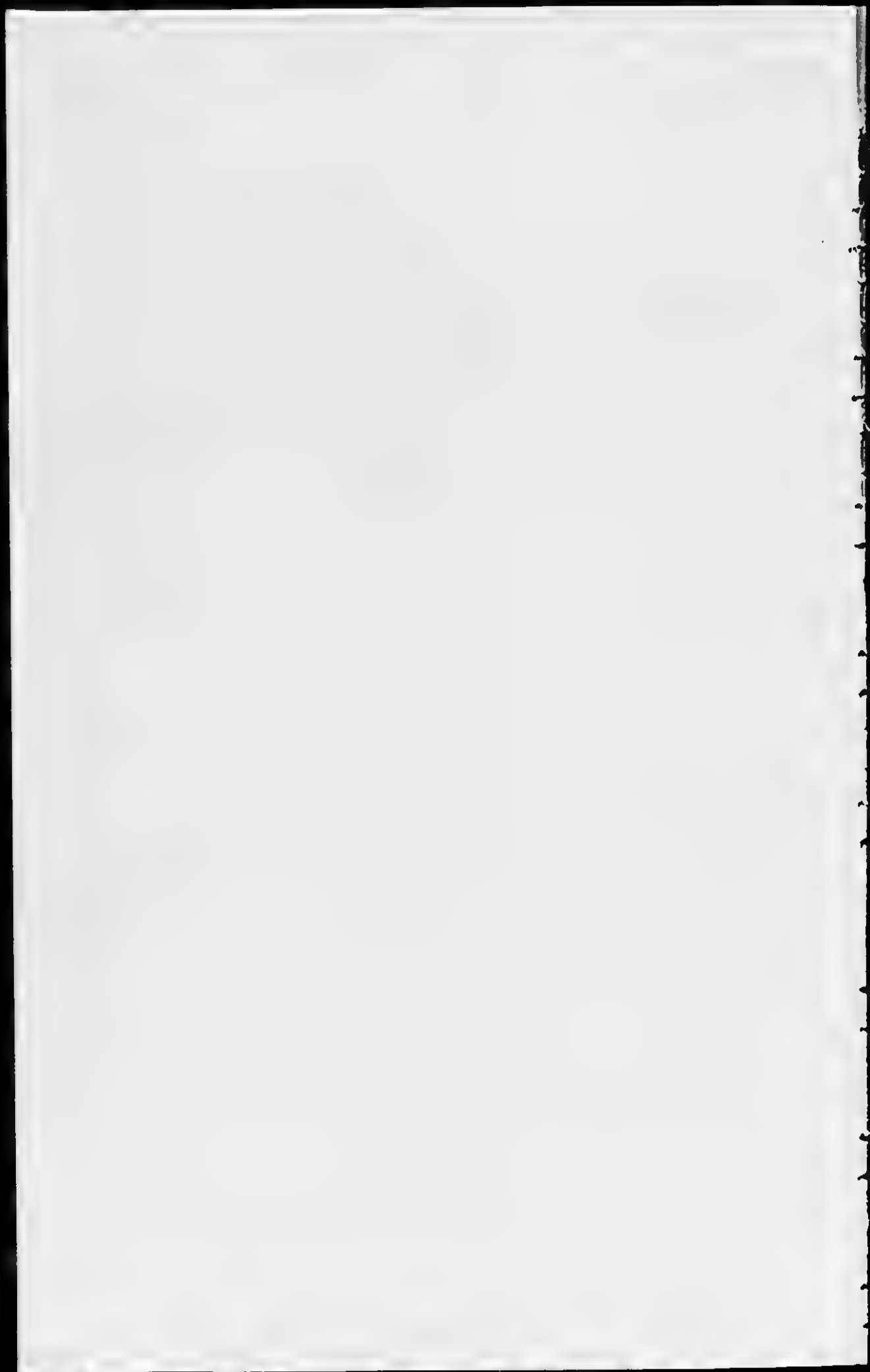
Today only Calvert has the combination of spirits and choice straight whiskies to create this superb blend of unique character and unsurpassed smoothness. **CALVERT EXTRA**

BLENDED WHISKEY 86 PROOF

The straight whiskey in this product is four years old, minimum of thirty-five per cent straight whiskey, forty-five per cent grain neutral spirits, twenty-five per cent straight whiskey, four years old, and five per cent straight whiskey, five years old, four per cent straight whiskey, six years old.

BEST COPY AVAILABLE

from the original bound volume



10. Under date of January 28, 1963, defendant Avis issued a Notice of Denial of plaintiff's Label Certificate Application, stating *inter alia*:

"4. Your certificate application, under the labeling provisions of the Federal Alcohol Administration Act and regulations pursuant thereto, dated as shown in item 3, to cover products the containers of which bear the labels affixed to such application, and identified in items 1 and 2 above has been duly considered, and is hereby denied for the following reasons:

"All of the wording on the back label to the effect that the grain neutral spirits in the product were put aside years ago, and that such spirits have been stored " * * * for at least four years in specially selected used cooperage—barrels which were previously used for aging fine whiskies" must be deleted to conform with the distilled spirits labeling regulations (27 CFR 5.39 (d)). This section of the regulations provides "Age, maturity, or similar statements or representations as to neutral spirits * * * are misleading and are prohibited from being stated on any label." "

11. Section 5(e) of the Federal Alcohol Administration Act (27 U.S.C. 205(e)) provides that it shall be unlawful for specified persons, including distillers, rectifiers and blenders, to sell, ship or deliver liquor products

" . . . unless such products are bottled, packaged and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding, and labeling and size and fill of container

(1) As will prohibit deception of the consumer with respect to such products or the quality thereof and as will prohibit, irrespective of falsity, such statements relating to age,

12 A

manufacturing processes, analyses, guarantees, and scientific or irrelevant matters as the Secretary of the Treasury finds *to be likely* to mislead the consumer;

- (2) as will provide the consumer with adequate information as to the identity and quality of the products [and] the alcoholic content thereof . . .;
- (3) as will require an accurate statement, in the case of distilled spirits . . . produced by blending or recitification, if neutral spirits have been used in the production thereof, informing the consumer of the percentage of neutral spirits so used and of the name of the commodity from which such neutral spirits have been distilled . . ."

Regulations were issued pursuant to Section 5(e) in 1936 by the Administrator. The office of Administrator has since been abolished and his powers and duties transferred to the Secretary of the Treasury (Reorganization Plan III of 1940, 54 Stat. 1232). Regulation 5.39(c) formerly 5.39(d)) states:

"Age, maturity, or similar statements or representations as to neutral spirits . . . are misleading and are prohibited from being stated on any label."

Regulation 5.21(a) provides:

"'Neutral spirits' or 'alcohol' are distilled spirits distilled from any material at or above 190 proof, whether or not such proof is subsequently reduced."

12. Each and every statement made on the back label set forth in paragraph 9 hereof is in all respects true and is in no way misleading to the consumer of the alcoholic beverage.

13. The back label set forth in paragraph 9 hereof is in no way in contravention of either the statute (27 U.S.C.

§ 205(e)) or the regulation (27 C.F.R. § 5.39(c)) and the decision of the Director to the contrary was erroneous, arbitrary, and capricious.

14. If it should be held that the aforesaid label is in violation of the regulation (27 C.F.R. § 5.39(c)) then the said regulation is null and void since it exceeds the powers granted to the Secretary by the statute.

15. Defendants' regulation (27 C.F.R. § 5.39(a)), in conformity with the statutory purpose of preventing deception as to quality and unfair competition and to provide the consumer with adequate information with reference to the identity and quality of the product, requires a distiller and blender of whiskey who stores his product in reused cooperage to affirmatively state on the label of such whiskey the fact that it has been stored in reused cooperage. Nevertheless, however, defendants' regulation (27 C.F.R. § 5.39(c)), as interpreted by defendants, absolutely prohibits a distiller and blender of grain neutral spirits who stores his product in reused cooperage from affirmatively stating on the label thereof that such grain neutral spirits have been stored in reused cooperage. Defendants' regulation, as so interpreted, has no rational relation to the statutory purpose above referred to and is arbitrary, capricious and in excess of statutory authority.

16. Since the storage of plaintiff's specially distilled grain neutral spirits in specially selected used cooperage as hereinabove described does, in fact, improve the aroma, taste, quality and other characteristics of such grain neutral spirits it is arbitrary and capricious and beyond the scope of the authority of defendants to promulgate a regulation (27 C.F.R. 5.39(c)) which would prevent plaintiff from making this true statement on its label. Such a regulation has no reasonable relation to the purposes of the statute (27 U.S.C. 205(e)) which are to prevent deception and unfair competition and to provide

the consumer with adequate information with reference to the identity and quality of the product and the alcoholic content thereof.

17. Plaintiff has devoted years of effort and expended large sums of money in the preparation of these specially distilled and stored grain neutral spirits and defendants' acts in prohibiting plaintiff from properly labeling "Calvert Extra" is arbitrary and capricious and will irreparably and unjustifiably injure plaintiff.

18. Plaintiff has exhausted its administrative remedies and has no adequate remedy at law.

WHEREFORE, plaintiff prays this Honorable Court:

1. For a decree annulling and suspending the action of the defendants in denying plaintiff's application for a certificate of Label Approval under the Federal Alcohol Administration Act.

2. For a decree declaring defendants regulation 5.39 (c) invalid and beyond the authority granted to defendant Dillon by the Federal Alcohol Administration Act.

3. For a decree enjoining defendants from denying plaintiff its rights under the said Federal Alcohol Administration Act.

4. For a decree declaring that plaintiff's label as submitted is not misleading.

5. For a decree ordering defendants to issue plaintiff a Certificate of Label Approval under the Federal Alcohol Administration Act.

15 A

6. For such other and further relief as the nature of the case may require and to the Court may seem just and proper.

HOGAN & HARTSON

By Edmund L. Jones
EDMUND L. JONES

By C. Frank Reifsnyder
C. FRANK REIFSNYDER
800 Colorado Building
Washington 5, D. C.

WHITE & CASE

By Orison S. Marden
ORISON S. MARDEN

By William D. Conwell
WILLIAM D. CONWELL
14 Wall Street
New York, New York

[Filed May 23, 1963]

* * * *

DEFENDANTS'
MOTION TO DISMISS; AND ALTERNATIVE
MOTION FOR SUMMARY JUDGMENT

Come now the defendants by their attorney, the United States Attorney for the District of Columbia, and respectfully move the Court to dismiss this action for failure to state a claim upon which relief can be granted.

In the alternative, defendants move the Court for summary judgment on the ground that there is no issue as to any material fact and defendants are entitled to judgment as a matter of law. Incorporated herein and made a part of the motion for summary judgment by attachment are the certified records of the Treasury Department relating to this matter, identified as indicated:

<i>Description of Government Exhibit</i>	<i>Govt. Ex. No.</i>
Denial dated January 2, 1963, of plaintiff's first application for approval of label under the Federal Alcohol Administration Act	1
Denial dated January 28, 1963, of plaintiff's second application for approval of label under the Federal Alcohol Administration Act	2
Approval dated February 11, 1963, of plaintiff's third application for label certificate under the Federal Alcohol Administration Act (for plant at Louisville, Kentucky)	3

<i>Description of Government Exhibit</i>	<i>Govt. Ex. No.</i>
Approval dated February 11, 1963, of plaintiff's fourth application for label certificate under the Federal Alcohol Administration Act (for plant at Baltimore, Maryland)	4
Federal Alcohol Control Administration Misbranding Regulations, Series 1, Revision 1, August 10, 1934	5
AM-225 issued by the Federal Alcohol Control Administration on September 21, 1934, containing Misbranding Rulings Nos. 1 to 15	6
Federal Alcohol Administration Notice of Hearing with Reference to Proposed Distilled spirits Misbranding Regulations, dated October 14, 1935	7
AM-275 issued by the Federal Alcohol Control Administration on November 20, 1934, containing Misbranding Rulings Nos. 49 to 66	8
Federal Alcohol Control Administration Regulations Relating to False Advertising and Misbranding of Distilled Spirits, issued May 13, 1935	9
Pertinent excerpts from Transcript of 1948 Hearing Convened to Consider Proposals for Amendments to Regulation No. 5, 27 C.F.R., Part 5	10
Pertinent excerpts from Transcript of 1956 Hearing Convened to Consider Proposals for Amendments to Regulation No. 5, 27 C.F.R., Part 5 (at Washington, D.C.)	11

18 A

Description of Government Exhibit	Govt. Ex. No.
Pertinent excerpts from Transcript of 1956 Hearing Convened to Consider Proposals for Amendments to Regulation No. 5, 27 C.F.R., Part 5 (at San Francisco, California)	12
Supplementary Letter Memorandum dated January 10, 1957, submitted by the League of Distilled Spirits Rectifiers, Inc., in connection with 1956 Hearing	13
Supplementary Brief Received January 4, 1957, submitted by the Distillers Company, Ltd., in connection with 1956 Hearing	14
Supplementary Letter dated December 4, 1956, submitted by the National Distillers Products Corp., in connection with 1956 Hearing	15
Telegram dated December 4, 1956, submitted by the Fleischman Distilling Corp., in connection with 1956 Hearing	16
Telegram and Statement of Views dated December 4, 1956, submitted by the Barton Distilling Company, in connection with 1956 Hearing	17

In support of the motion to dismiss and the alternative motion for summary judgment, defendants herewith submit a Memorandum of Points and Authorities. And in support of the motion for summary judgment, defendants also submit a Statement of Material Facts.

/s/ David C. Acheson
DAVID C. ACHESON
United States Attorney

/s/ Charles T. Duncan
CHARLES T. DUNCAN, Principal
Assistant United States Attorney

/s/ Joseph M. Hannon
JOSEPH M. HANNON
Assistant United States Attorney

/s/ Gil Zimmerman
GIL ZIMMERMAN
Assistant United States Attorney

Of Counsel:

ARTHUR G. BARNHART, Attorney
Alcohol and Tobacco Tax Legal Division
Office of Chief Counsel
Internal Revenue Service

* * * *

[Filed May 23, 1963]

* * * *

DEFENDANTS'
STATEMENT OF MATERIAL FACTS PURSUANT
TO LOCAL RULE 9(h), IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Defendants adopt as their Statement of Material Facts in support of their motion for summary judgment the facts as set forth in their memorandum of points and authorities.

/s/ David C. Acheson
DAVID C. ACHESON
United States Attorney

/s/ Charles T. Duncan
CHARLES T. DUNCAN, Principal
Assistant United States Attorney

/s/ Joseph M. Hannon
JOSEPH M. HANNON
Assistant United States Attorney

/s/ Gil Zimmerman
GIL ZIMMERMAN
Assistant United States Attorney

Of Counsel:

ARTHUR G. BARNHART, Attorney
Alcohol and Tobacco Tax Legal Division
Office of Chief Counsel
Internal Revenue Service

21 A

Govt. Ex. 2

SEAGRAM v. DILLON

Civil Action 263-63

Form 1651 (Rev. July 1958)

U. S. Treasury Department - Internal Revenue Service
NOTICE OF DENIAL OF LABEL CERTIFICATE
APPLICATION UNDER THE FEDERAL ALCOHOL
ADMINISTRATION ACT

Name and Address of Permittee

TO: JOSEPH E. SEAGRAM & SONS, INC.; d/b/a
CALVERT DISTILLING CO.; Washington
Boulevard, three miles south of Baltimore, Md.
(P. O. Box 208)

1. Brand name: CALVERT EXTRA; 2. Class and Type:
Blended Whiskey; 3. Date of certificate application: Jan-
uary 25, 1963.

4. Your certificate application, under the labeling provisions of the Federal Alcohol Administration Act and regulations pursuant thereto, dated as shown in item 3, to cover products the containers of which bear the labels affixed to such application, and identified in items 1 and 2 above has been duly considered, and is hereby denied for the following reasons: All of the wording on the back label to the effect that the grain neutral spirits in the product were put aside years ago, and that such spirits have been stored "* * *" for at least four years in specially selected used cooperage—barrels which were previously used for aging fine whiskies" must be deleted to conform with the distilled spirits labeling regulations (27 CFR 5.39(d)). This section of the regulations provides "Age,

22 A

maturity, or similar statements or representations as to neutral spirits * * * are misleading and, are prohibited from being stated on any label."

FSchildwachter/eib

1/28/63

5. Date: January 28, 1963; 6. Director, Alcohol and Tobacco Tax Division:

/s/ Dwight E. Avis

Form 1649 (Rev. 9-57) (Combines Form 1647 and Form 1649)

U. S. Treasury Department—Internal Revenue Service

LABEL APPROVAL

Under Federal Alcohol Administration Act

Section I Application

1. Applicant's Serial No. (*If any*)

2. Name of Permittee as Shown on Basic Permit, or Name of Brewer (*Include trade name, if used on these labels*) and P. O. Address of Bottling Plant: JOSEPH E. SEAGRAM & SONS, INC., d/b/a CALVERT DISTILLING CO.; Washington Boulevard, three miles south of Baltimore, Md.

3. IN CASE OF IMPORTS ONLY (Permittee is)
(*Check applicable box*)

☐ IMPORTER

☐ TRANSFEREE IN BOND

4. Basic Permit No.: DSP-MD-3

5. The above listed permittee hereby makes application for a certificate of label approval for an alcoholic beverage to be introduced in commerce in containers bearing the labels affixed hereto, and identified as: A. Brand name: CALVERT EXTRA; B. Class and type: BLENDED WHISKEY.

6. State any wording, except required indicia on container, not shown on labels. (*Caps, celoseals, etc.*) If optional so indicate.

7. Certificate to be mailed to (*Name and address*)

The applicant hereby declares, under the penalties of perjury, that to the best of his knowledge and belief all statements appearing in this application, including representations on labels and in supplementary documents, are true and correct, and truly and correctly represent the contents of the containers to which such labels will be applied.

8. Date: Jan. 25, 1963

Signature of applicant or signature and title of authorized agent: /s/ Frederick J. Lind, Vice President.

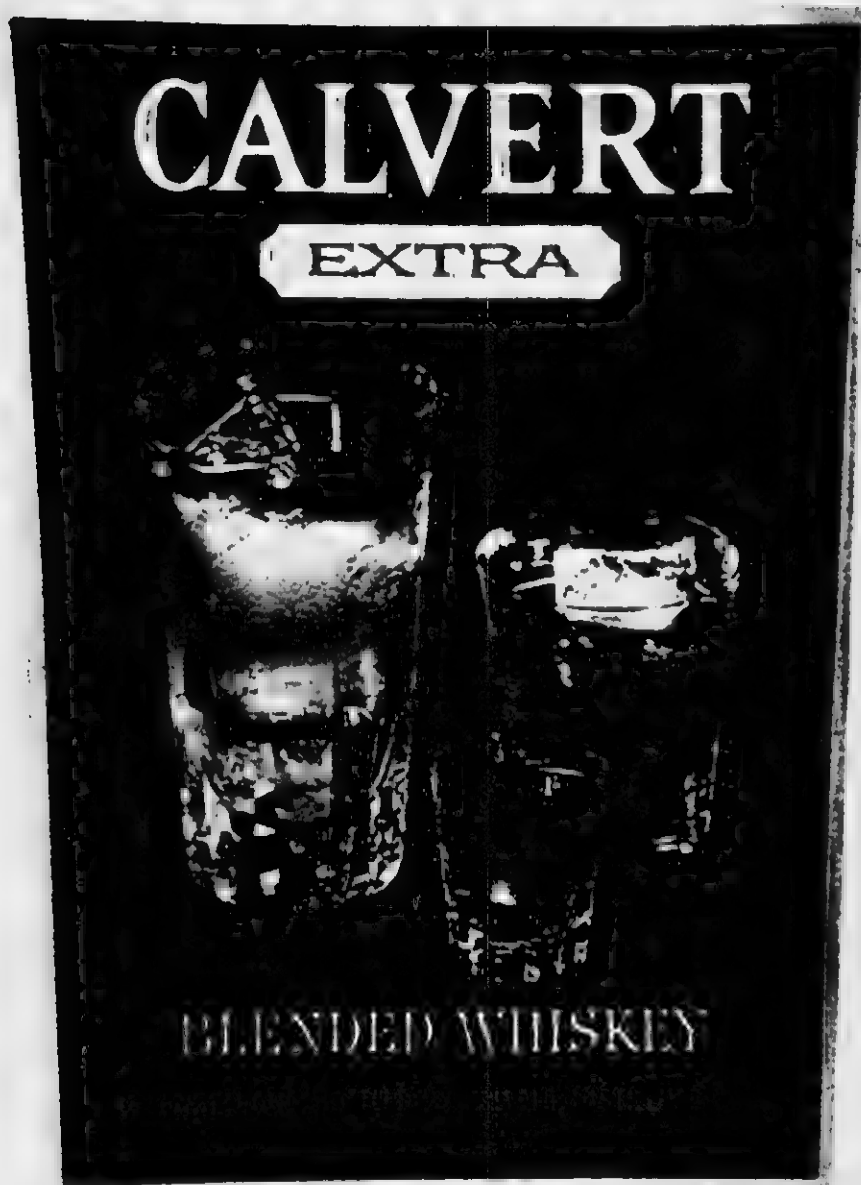
* * * *

24 A

LABEL APPROVAL

For Use of Internal Revenue Service Only

FRONT LABEL



BACK LABEL

CALVERT
EXTRA

Calvert Extra was begun years ago when these spirits and whiskeys were put aside. The grain neutral spirits in this product contribute a unique, delightful taste of their own, the result of a special distillation process and of storage for at least four years in specially selected used cooperage barrels which were previously used for aging our fine whiskeys.

Today only Calvert has the combination of spirits and choice straight whiskeys to create this superb blend of unique character and unsurpassed smoothness—CALVERT EXTRA.

BLENDED WHISKY

86 PROOF

The straight whiskeys in this product are four years or more old. Thirty-five per cent straight whiskeys, fifty-five per cent grain neutral spirits. Twenty-five per cent straight whiskeys four years old, six per cent straight whiskeys five years old, four per cent straight whiskeys six years old.

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25 A

Govt. Ex. 3

SEAGRAM v. DILLON

Civil Action 263-63

Form 1649 (Rev. 9-57) (Combines Form 1647 and Form 1649)

U. S. Treasury Department—Internal Revenue Service

LABEL APPROVAL

Under Federal Alcohol Administration Act

1. Applicant's Serial No.: (*If any*) L-3-63

Section I Application

2. Name of Permittee as Shown on Basic Permit, or Name of Brewer (*Include trade name, if used on these labels*) and P.O. Address of Bottling Plant: JOSEPH E. SEAGRAM & SONS, INC., d/b/a Calvert Distilling Co.; Seventh Street Road; P.O. Box 240, Louisville, Kentucky

3. IN CASE OF IMPORTS ONLY (Permittee is)
(*Check applicable box*)

☐ IMPORTER ☐ TRANSFEREE IN BOND

4. Basic Permit No.: CIN-DRB-27

5. The above listed permittee hereby makes application for a certificate of label approval for an alcoholic beverage to be introduced in commerce in containers bearing the labels affixed hereto, and identified as: A. Brand name: CALVERT EXTRA; B. Class and type: BLENDED WHISKEY.

6. State any wording, except required indicia on container, not shown on labels. (*Caps, celoseals, etc.*) If

optional so indicate: NET CONTENTS BLOWN IN BOTTLE

7. Certificate to be mailed to (*name and address*):

N. Cheper, Joseph E. Seagram & Sons, Inc., 375 Park Ave., New York 22, New York & G. A. Ochs, Joseph E. Seagram & Sons, Inc., P. O. Box 240, Louisville, Kentucky.

The applicant hereby declares, under the penalties of perjury, that to the best of his knowledge and belief all statements appearing in this application, including representations on labels and in supplementary documents, are true and correct, and truly and correctly represent the contents of the containers to which such labels will be applied.

8. Date: February 8, 1963

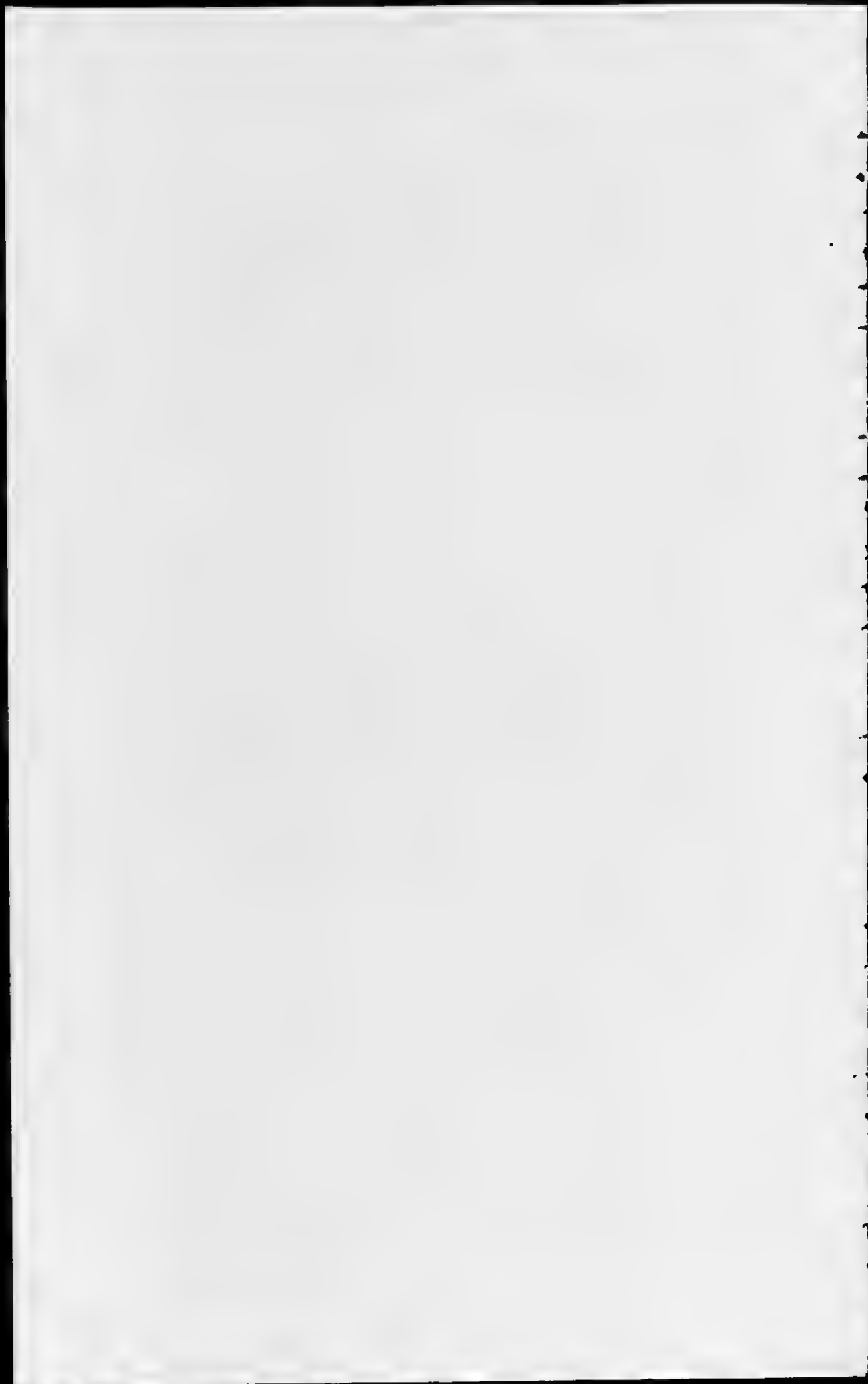
Signature of applicant or signature and title of authorized agent: JOSEPH E. SEAGRAM & SONS, INC., d/b/a Calvert Distilling Co., /s/ N. Cheper, N. CHEPER, Attorney-in-Fact.

* * * *

9. Date issued: February 11, 1963

Director, Alcohol and Tobacco Tax Division:

/s/ Dwight E. Avis



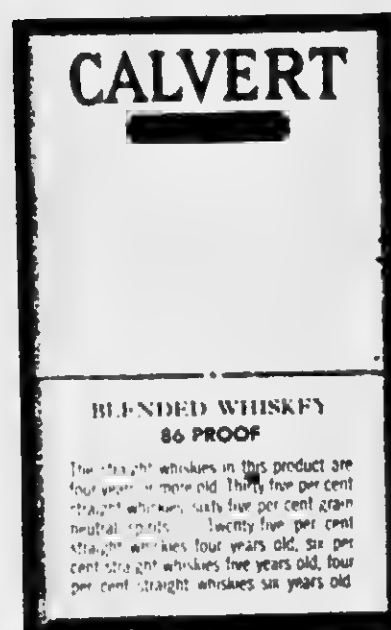
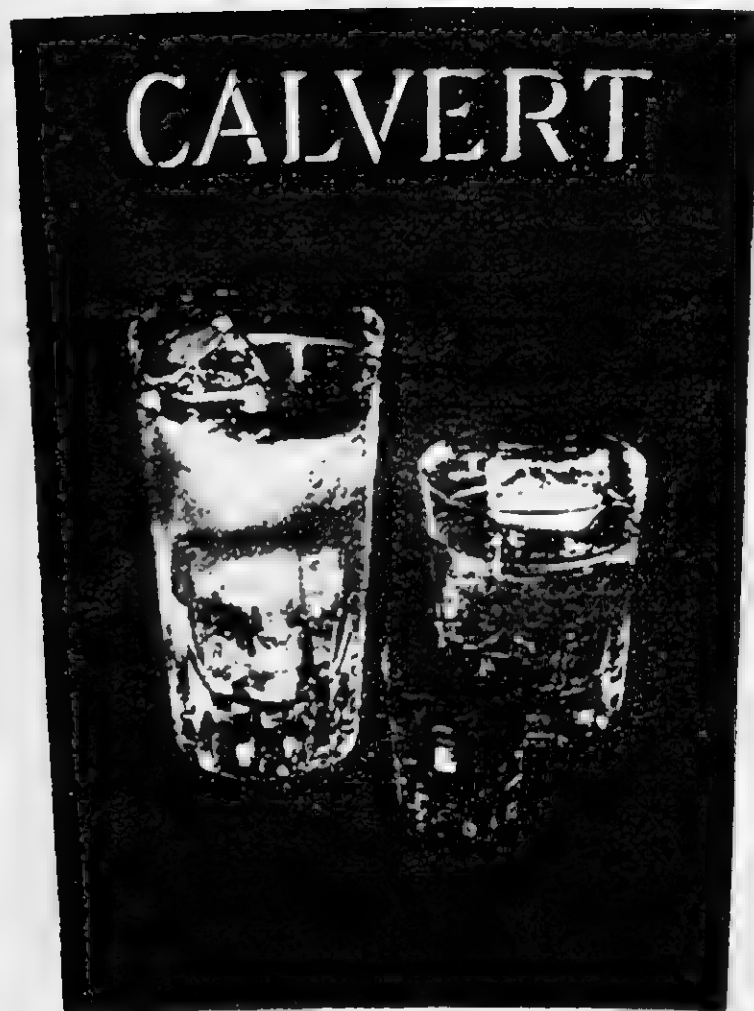
APPROVED BY	LABEL APPROVAL	APP. SERIAL NO., IF ANY
FOR USE OF INTERNAL REVENUE SERVICE ONLY		
REMARKS		

USE OF THIS FORM IS
 LIMITED TO THE FOLLOWING

FILE IN ACCORDANCE WITH

USE OF THIS FORM IS LIMITED TO THE FOLLOWING
 ONLY. IT IS NOT TO BE USED FOR OTHER PURPOSES.

APPLY LABELS BELOW



FORM 1649 (REV. 9-57)

A-8

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28 A

Govt. Ex. 4

SEAGRAM v. DILLON

Civil Action 263-63

Form 1649 (Rev. 9-57) (Combines Form 1647 and Form 1649)

U. S. Treasury Department—Internal Revenue Service

LABEL APPROVAL

Under Federal Alcohol Administration Act

1. Applicant's Serial No. (*If any*)

Section I Application

2. Name of Permittee as Shown on Basic Permit, or Name of Brewer (*Include trade name, if used on these labels*) and P.O. Address of Bottling Plant: JOSEPH E. SEAGRAM & SONS, INC., d/b/a Calvert Distilling Co., Washington Boulevard, 3 miles south of Baltimore, Maryland, P.O. Box 208, Baltimore, Maryland.

3. IN CASE OF IMPORTS ONLY (Permittee is)
(*Check applicable box*)

☐ IMPORTER

☐ TRANSFEREE IN BOND

4. Basic Permit No.: PHI-DRB-17

5. The above listed permittee hereby makes application for a certificate of label approval for an alcoholic beverage to be introduced in commerce in containers bearing the labels affixed hereto, and identified as: A. Brand name: CALVERT EXTRA; B. Class and type: BLENDED WHISKEY

6. State any wording, except required indicia on container, not shown on labels. (*Caps, celloseals, etc.*) If

optional so indicate: NET CONTENTS BLOWN IN BOTTLE

7. Certificate to be Mailed to (*Name and address*): N. Cheper, Joseph E. Seagram & Sons, Inc., 375 Park Ave., New York 22, New York & A. Theriault, Joseph E. Seagram & Sons, Inc., P.O. Box 208, Baltimore 3, Maryland.

The applicant hereby declares, under the penalties of perjury, that to the best of his knowledge and belief all statements appearing in this application, including representations on labels and in supplementary documents, are true and correct, and truly and correctly represent the contents of the containers to which such labels will be applied.

8. Date: February 8, 1963

Signature of Applicant or Signature and Title of Authorized Agent: JOSEPH E. SEAGRAM & SONS, INC., d/b/a Calvert Distilling Co.; /s/ N. Cheper, N. CHEPER, Attorney-in-Fact

* * * *

9. Date issued: February 11, 1963

Director, Alcohol and Tobacco Tax Division: /s/ Dwight E. Avis.

APPROVED	LABEL APPROVAL	APP. SERIAL NO., IF ANY
FOR USE OF INTERNAL REVENUE SERVICE ONLY		
REMARKS		

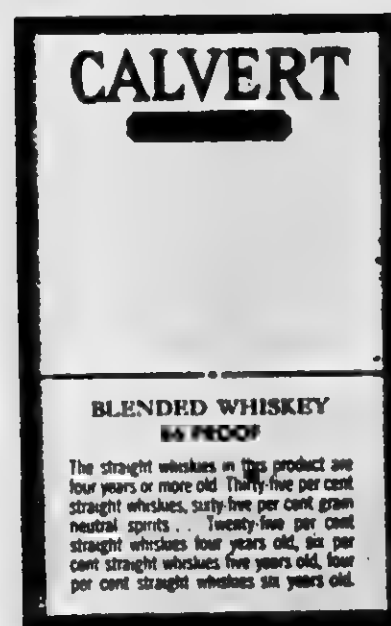
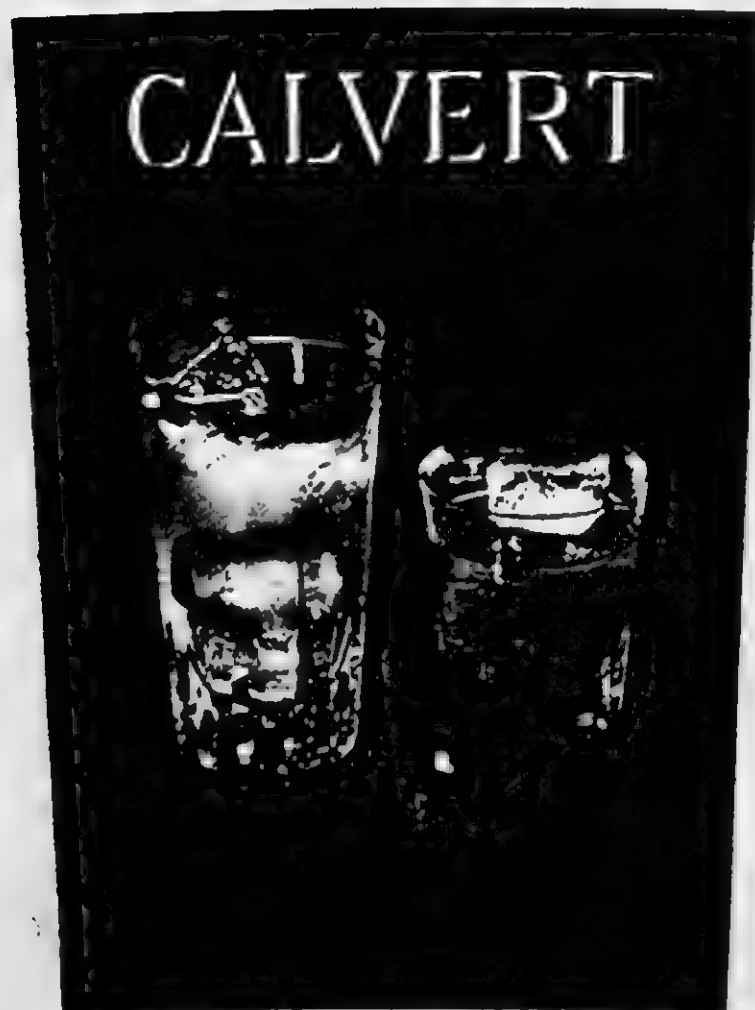
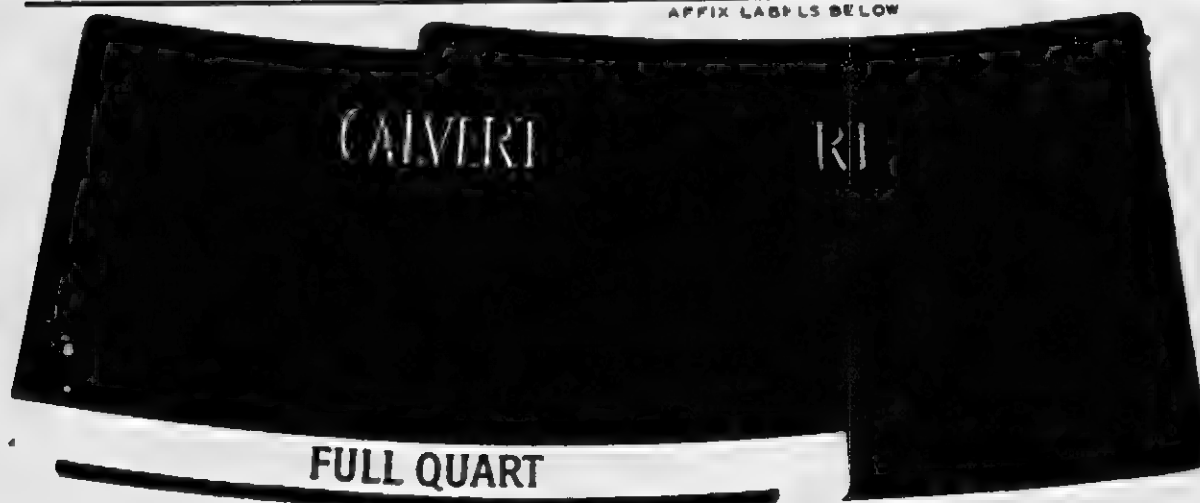
CERTIFICATE NUMBER
100-1A-1-1

REMARKS MADE IN ACCORDANCE WITH

2-2-1-3

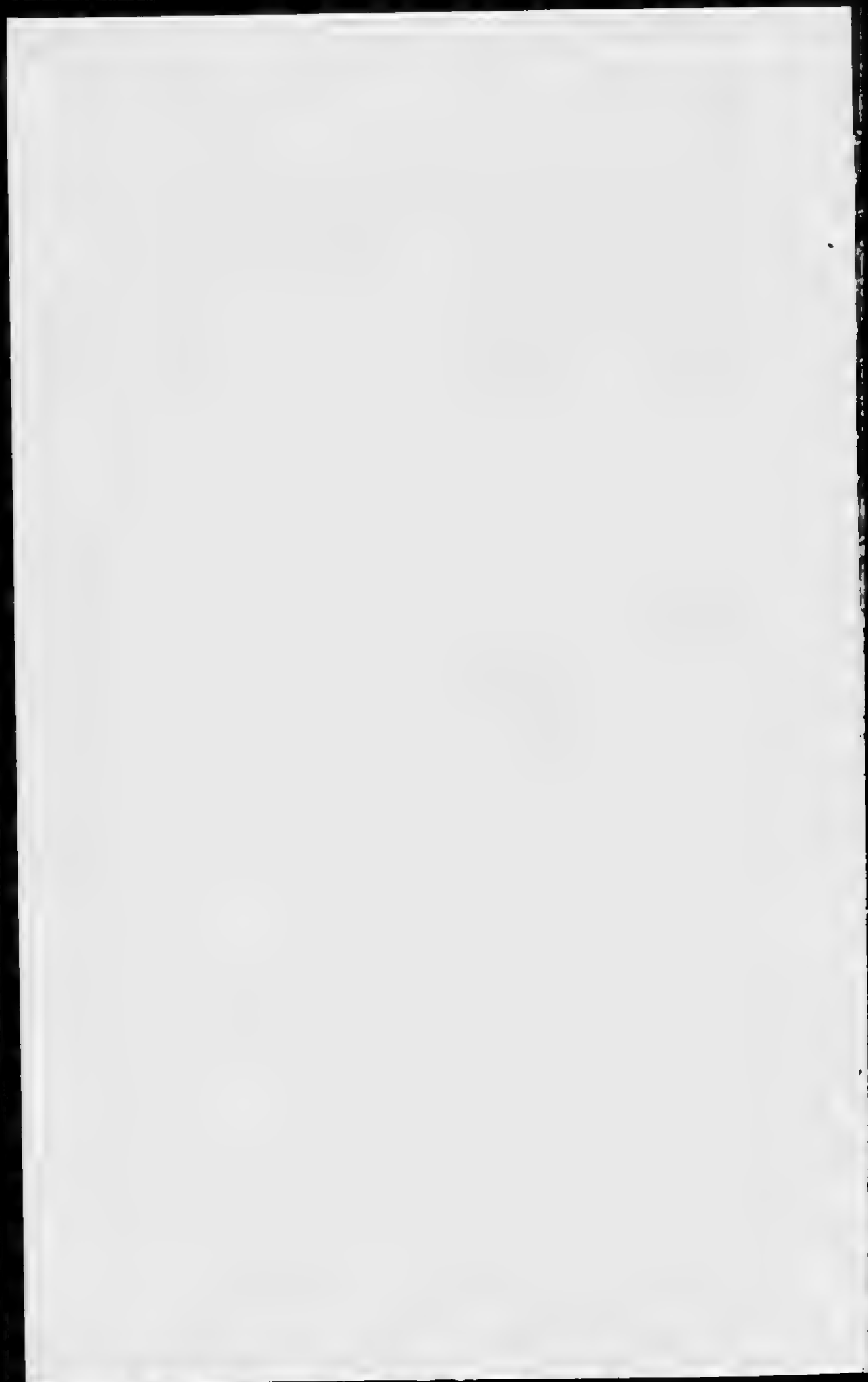
A STATEMENT OF NET CONTENTS MUST BE ELOHN
OR EMBEDED INTO BOTTLE OR CONTAINER.

AFFIX LABELS BELOW



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81 A

Govt. Ex. 6

Civil Action 263-63

SEAGRAM v. DILLON

FEDERAL ALCOHOL CONTROL ADMINISTRATION

Washington, D. C.

MISBRANDING RULINGS NOS. 1 to 15

September 21, 1934.

AM-225

EXPLANATORY STATEMENT

The several codes of fair competition for the alcoholic beverage industries each prohibit the publication or dissemination in any manner of any false advertisement of alcoholic beverages, and the sale or other introduction into commerce of alcoholic beverages that are misbranded within the meaning of the Federal Food & Drug Act, or that do not conform to standards of fill, standards of identity, standards of quality or label requirements prescribed by regulations of the Federal Alcohol Control Administration.

The Administration now has in force regulations relating to the standards of identity, standards of fill and label requirements for distilled spirits. For the information of members of the alcoholic beverage industries the Administration is publishing from time to time a series of mimeographs entitled "Misbranding Rulings". The series includes rulings and interpretations, formal and informal, and other materials of general interest relating to the administration of the said code provisions and regulations. These rulings and interpretations, except where specifically indicated, have not been acted upon by the Board of the Federal Alcohol Control Administration. They, therefore, do not modify the said code provisions or regulations

and are subject to withdrawal or modification by subsequent action of the Board of the Federal Alcohol Control Administration.

Each ruling is numbered in sequence and may be referred to as "Misbranding Ruling No. ____".

* * * *

RULING NO. 4.—Statement of Age of Distilled Spirits.
Memoranda of General Counsel's office,
August 30, 1934.

There follows in outline form the various requirements under section 11 (a), 12 (i) and other provisions of the revised labeling regulations for distilled spirits with respect to statements of age for domestic whiskeys, foreign whiskeys, rum and brandy (cognac) and miscellaneous distilled spirits.

This memorandum will serve as a guide to the legal division in administering the requirements of the revised labeling regulations for distilled spirits.

STATEMENT OF AGE UNDER REVISED LABELING REGULATIONS FOR DISTILLED SPIRITS

"Age" is defined as the period during which, after distillation and before bottling, distilled spirits have been kept in oak containers, charred if for whiskey of American type.

The following outline sets forth the various requirements as to statement of age for distilled spirits under the revised labeling regulations for distilled spirits.

* * * *

IV.—FOR MISCELLANEOUS DISTILLED SPIRITS.

Age, maturity or similar statements or representations as to neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs and bitters, are misleading and are prohibited.

* * * *

33 A

Govt. Ex. 7

Civil Action 263-63

SEAGRAM v. DILLON

FEDERAL ALCOHOL ADMINISTRATION
Washington

October 14, 1935.

NOTICE OF HEARING WITH REFERENCE TO
PROPOSED DISTILLED SPIRITS MISBRANDING
AND ADVERTISING REGULATIONS

Pursuant to the provisions of Section 5 of the Federal Alcohol Administration Act, approved on August 29, 1935:

NOTICE IS HEREBY GIVEN of a public hearing to be held on Wednesday, October 30, 1935, at 10:00 A. M., in Room 1318, Department of Justice Building, Washington, D. C., with reference to proposed Distilled Spirits Misbranding Regulations.

FURTHER NOTICE IS HEREBY GIVEN of a public hearing to be held on Thursday, October 31, 1935, at 2:00 P. M., at the above address, with reference to proposed Distilled Spirits Advertising Regulations.

At these hearings all interested parties will be heard in person or by duly appointed representatives upon these proposed regulations.

/s/ Franklin C. Hoyt
FRANKLIN C. HOYT
Administrator

FA-34

* * * *

ARTICLE I. DEFINITIONS

As used in these regulations —

* * * *

(e) The term "distilled spirits" means ethyl alcohol, hydrated oxide of ethyl, spirits of wine, whiskey, rum, brandy, gin, and other distilled spirits, including all dilutions and mixtures thereof, for non-industrial use.

* * * *

(j) The term "age" means the period during which, after distillation and before bottling, distilled spirits have been kept in oak containers, charred if for whiskey of American type other than straight corn whiskey, blended corn whiskey (corn whiskey—a blend), or a blend of straight corn whiskeys.

* * * *

ARTICLE II. STANDARDS OF IDENTITY FOR DISTILLED SPIRITS

Sec. 20. *Application of Standards.*—The standards of identity for the several classes and types of distilled spirits set forth herein shall be applicable to all regulations and permits issued under the Act. Whenever any term for which a standard of identity has been established herein is used in any such regulation or permit, such term shall have the meaning assigned to it by such standard of identity.

Sec. 21. *The Standards of Identity.*—Standards of identity for the several classes and types of distilled spirits set forth herein shall be as follows:

Class 1. *Neutral Spirits.*

(a) "Neutral spirits" or "alcohol" are distilled spirits distilled from any material at or above 190°

35 A

proof, whether or not such proof is subsequently reduced.

(b) "Grain neutral spirits" or "grain alcohol" are alcoholic distillates from a fermented mash of grain distilled at or above 190° proof, whether or not such proof is subsequently reduced.

Class 2. *Whiskey.*

(a) "Whiskey" is an alcoholic distillate from a fermented mash of grain distilled, at less than 190° proof, in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to whiskey, and withdrawn from the cistern room of the distillery at not more than 110° and not less than 80° proof, whether or not such proof is further reduced prior to bottling to not less than 80° proof; and also includes mixtures of the foregoing distillates for which no specific standards of identity are prescribed herein.

(b) "Straight whiskey" is an alcoholic distillate from a fermented mash of grain distilled at not exceeding 160° proof and withdrawn from the cistern room of the distillery at not more than 110° and not less than 80° proof, whether or not such proof is further reduced prior to bottling to not less than 80° proof, and is—

(1) Aged for not less than twelve calendar months if bottled on or before June 30, 1936; or

(2) Aged for not less than eighteen calendar months if bottled on or after July 1, 1936, and before January 1, 1937; or

(3) Aged for not less than twenty-four calendar months if bottled on or after January 1, 1937.

The term "straight whiskey" also includes mixtures of straight whiskey, which, by reason of being homogeneous, are not subject to the rectification tax under the Internal Revenue Laws.

* * * *

(g) "Blended whiskey" (Whiskey—A Blend) is a mixture which contains at least 20% by volume of 100 proof straight whiskey and, separately or in combination, whiskey or grain neutral spirits, if such mixture at the time of bottling is not less than 80° proof.

* * * *

(j) "Spirit whiskey" is a mixture which contains less than 20% by volume of 100 proof straight whiskey and grain neutral spirits, or a mixture of whiskey and grain neutral spirits, if such mixture at the time of bottling is not less than 80° proof.

* * * *

Sec. 32. *Mandatory Label Information.*—There shall be stated:

(a) On the Brand Label—

(1) Brand name, in accordance with Section 33 below.

(2) Class and type, in accordance with Section 34 below.

(3) Name and address, (except in case of imported distilled spirits) in accordance with Section 35 below.

(b) On the brand label or on a separate label affixed in immediate proximity thereto on the same side of the bottle, or on a back label—

37 A

(4) In case of imported distilled spirits, name and address of importer, in accordance with Section 35 below.

(c) On a separate label (for the purposes of these regulations to be known as the government label), in such manner and form as shall be prescribed by the Administrator.—

(5) Alcoholic content, in accordance with Section 36 below.

(6) Net contents, in accordance with Section 37 below.

(7) Artificial or excessive coloring or flavoring, in accordance with Section 38 below.

(8) Percentage of neutral spirits and name of commodity from which distilled, in accordance with Section 38 (a) below.

(9) Age of whiskey and straight whiskey, and respective percentages of whiskey, straight whiskey and grain neutral spirits, in accordance with Section 39 below.

(10) State of distillation of domestic types of whiskey and of straight whiskey, in accordance with Section 35 (g) below.

(11) The legend "Labeled after December 31, 1935."

The mandatory information, or any part thereof, required by subsection (c) to be stated on a separate label may, if desired, reappear or be restated on the brand label, in which event there shall also reappear or be restated all the information required by these regulations to be stated in conjunction therewith. If it is not desired to use a separate label, the mandatory information re-

quired by subsection (c) may, in lieu thereof, appear on the brand label, if such information is stated in the same manner and form as required for the separate label.

* * * *

Sec. 38. Presence of Neutral Spirits and Coloring, Flavoring, and Blending Materials.—(a) In the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification, if neutral spirits have been used in the production thereof, there shall be stated the percentage of neutral spirits so used and the name of the commodity from which such neutral spirits have been distilled. The statement of percentage and the name of the commodity shall be made in substantially the following form: “....% neutral spirits distilled from grain”; or “....% neutral spirits distilled from cane products”; or “....% neutral spirits distilled from fruit”; or “....% grain (cane products), (fruit) neutral spirits.” If grain neutral spirits are used in the production of any type of whiskey, the percentage and name of the commodity from which such neutral spirits have been distilled shall be stated as required in Section 39.

(b) In the case of neutral spirits or of gin produced by a process of continuous distillation, there shall be stated the name of the commodity from which such neutral spirits or gin has been distilled. The statement of the name of the commodity shall be made in substantially the following form: “Distilled from grain,” or “Distilled from cane products,” or “Distilled from fruit.”

* * * *

Sec. 39. *Statements of Age and Percentage.*—

(a) *Statement of Age and Percentage for Whiskey.*—There shall be stated in the case of whiskey (except Scotch, Irish, and Canadian and Blended Scotch, Irish, and Canadian whiskey, as defined in Article II, section 21, Class 2, and except straight whiskey bottled under the Bottling in Bond Act of the United States, in which cases statement of age shall be optional) the following:

(1) *Whiskey.*—In the case of whiskey (as defined in Article II, Section 21, Class 2 (a)), if not mixed, the age of the whiskey; if mixed, the age of the youngest whiskey. The statement of age in both cases under this paragraph shall be as follows: "This Whiskey is months old."

(2) *Straight Whiskey.*—In the case of any of the types of straight whiskey, the age of the straight whiskey. The statement of age in cases under this paragraph shall be as follows: "This whiskey is years (and/or months) old."

(3) *Blended Whiskey.*—In case of any of the types of blended whiskey as defined in Article II, Section 21, Class 2 (g) and (h), the age of the straight whiskey (or if there be two or more straight whiskeys, then of the youngest straight whiskey) together with the percentage by volume of whiskey, straight whiskey, and grain neutral spirits, therein.

The statement of age in cases under this paragraph shall be as follows, according to the number of straight whiskeys used: If only one straight whiskey is in the blend, the statement of the age shall read "The straight whiskey in this product is years (and/or months) old,

....% straight whiskey,% other whiskey,% grain neutral spirits." The age blank shall be filled in with the age of the straight whiskey. If the product does not contain other whiskey or grain neutral spirits, reference thereto shall be omitted. If more than one straight whiskey is in the blend, the statement of age shall read "The straight whiskeys in this product are years (and/or months) or more old,% straight whiskey,% other whiskey,% grain neutral spirits." The age blank shall be filled in with the age of the youngest straight whiskey. If no other whiskey is used in the blend, or if the blend does not contain grain neutral spirits, reference thereto shall be omitted.

In addition (but not as a substitute for the foregoing required statements) a statement may be made of the ages and percentages of all of the straight whiskeys in the blend. Such statements, if made, shall read "....% straight whiskey, years old,% straight whiskey, years old, and% straight whiskey, years old." The age and percentage blanks shall be filled in with the respective ages and percentages of all of the straight whiskeys in the blend.

(4) Blends of Straight Whiskeys.—If the product is a blend of straight whiskeys, the age of the youngest straight whiskey. The statement of age under this paragraph shall be as follows: "The straight whiskeys in this product are years (and/or months) or more old." The blank shall be filled in with the age of the youngest straight whiskey in the blend. In addition (but not as a substitute for the foregoing required

statement) a statement may be made of the ages and percentages of all of the straight whiskeys in the blend. Such statements, if made, shall read: "....% straight whiskey, years old,% straight whiskey, years old, and% straight whiskey, years old." The age and percentage blanks shall be filled in with the respective ages and percentages of all of the straight whiskeys in the blend.

(5) Spirit Whiskey.—In the case of spirit whiskey, the age of the whiskey or straight whiskey (or if there be two or more whiskeys or straight whiskeys, then the youngest whiskey or straight whiskey) together with the percentage by volume of the whiskey or straight whiskey and the percentage by volume of grain neutral spirits. Such statement shall be as follows: "The whiskey (straight whiskey) in this product is months (years) old;% whiskey (straight whiskey),% grain neutral spirits."

(6) Imported American Type Whiskeys.—In the case of imported American type whiskeys (as defined in Article II, Section 21, Class 9) the labels shall state the ages and percentages in the same manner and form as is required for the same type of whiskey produced in the United States.

(b) Statements of Age for Rum, Brandy, Scotch, Irish, and Canadian Whiskeys, and Blended Scotch, Blended Irish, and Blended Canadian Whiskeys.—

(1) Age may, but need not, be stated on labels of rums, brandies, Scotch whiskeys, Irish whiskeys, Canadian whiskeys, blended Scotch whiskeys, blended Irish whiskeys, and blended

Canadian whiskeys, as defined in Article II of these regulations.

(2) If age is stated, it shall be as follows: "This rum is years old"; "This brandy is years old"; "This whiskey is years old"; the blanks to be filled in with the age of the youngest distilled spirits in the product.

(c) Statements of Age and Percentage for Blended Scotch Type Whiskey and Blended Irish Type Whiskey.—

(1) Blended Scotch Type Whiskey.—Notwithstanding the provisions of subsection (a) above, there shall be stated in the case of blended Scotch type whiskey the age of the youngest malt whiskey, if any of the malt whiskeys in the product are less than three years old. If all the malt whiskeys in the product are three years or more old, the age may, but need not, be stated. The statement of age shall be in the following form:

"The malt whiskey in this product is years (and/or months) old.% malt whiskey,% other whiskey,"

the age blank to be filled in with the figure correctly stating the age not in excess of that of the youngest malt whiskey.

(2) Blended Irish Type Whiskey.—Notwithstanding the provisions of subsection (a) above, there shall be stated in the case of blended Irish type whiskey the age of the youngest malt whiskey, if any of the malt whiskeys in the product are less than three years old. If all the malt whiskeys in the product are three years or more

old, the age may, but need not, be stated. The statement of age shall be in the following form:

"The malt whiskey in this product is years (and/or months) old.% malt whiskey,% other whiskey,"

the age blank to be filled in with the figure correctly stating the age not in excess of that of the youngest malt whiskey.

(d) Other Distilled Spirits.—Age, maturity, or similar statements or representations as to neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs, bitters, and specialties are misleading and are prohibited from being stated on any label.

(e) Miscellaneous Age Representations.—

(1) If the age of any product for which age is required to be stated is in excess of one year, months in excess of a year may be omitted, and if the age is less than one month, the age shall be stated as "Less than one month" in lieu of "..... years (and/or months)."

(2) Age may be understated but may not be overstated.

(3) Any permissive additional statements as to age shall appear on the same labels as the required statements and only in direct conjunction therewith and in substantially the same size and kind of print. Any such additional permissive statements as to age not in direct conjunction with the required statements are prohibited, and all statements as to age other than the required statements, the additional permissive statements, and the optional statements for distilled spirits are prohibited. Additional per-

missive age and percentage statements shall not be given prominence, either by position or color, over required age and percentage statements.

(4) Variations in the form of the required statements or the additional permissive statements as to age and percentages are prohibited.

(5) Use of the Word "Old," or Other Representations as to Age.—If any age, maturity, or similar representation (including words or devices in any brand name or mark) is made relative to any distilled spirits (except neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs, and bitters), the age shall also be stated on all labels where such representation appears, and in script, type, or printing substantially as emphatic and conspicuous as such representation. Age, maturity, or similar representations as to neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs, and bitters, are misleading, and shall not appear upon any label, except that the use of the word "old" or other word denoting age, appearing as part of the brand name, shall not be deemed to be an age representation in the case of such distilled spirits, or in the case of distilled spirits bottled in bond under the Bottling in Bond Act of the United States. As to all other distilled spirits, the word "old" or other word denoting age, appearing as part of the brand name, shall be deemed to be an age representation unless the word "brand" appears in direct conjunction with such brand name in letters of equally conspicuous color and at least one-half the size of the type in which such brand name is printed.

Sec. 40. *General Requirements.*—

* * * *

(f) *Additional Information on Labels.*—Labels (other than the label to be known for the purposes of these regulations as the government label) may contain information other than the mandatory label information required by this article, provided such information complies with the requirements of this article, and does not conflict with, nor in any manner qualify statements required by, any regulations promulgated under the Act.

* * * *

Sec. 41. *Prohibited Practices.*—

(a) *Statements on Labels.*—Bottles containing distilled spirits, or any labels on such bottles, or any individual covering, carton, or other container of such bottles used for sale at retail, or any written, printed, graphic, or other matter accompanying such bottles to the consumer shall not contain—

(1) Any statement that is false or untrue in any particular or that, irrespective of falsity, directly or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific, or technical matter, tends to create a misleading impression. Examples of such prohibited statements are:

Reproductions of medals or facsimiles of awards, when no medals or awards have been given for the particular product.

The statement that the product is "100% straight whiskeys," when in fact the product is less than 100 proof.

The statement that "Fine Flavored, Genuine Bourbon Whiskey is Made Only in Kentucky."

Domestic products containing the statement
"Furnished to His Majesty, the King of
....."

"Due to our method of storage, this product ages in half the time."

"This whiskey is two months old. Due to our special aging process, however, it has the taste and characteristics of a much older whiskey."

"This whiskey is four months old. Due to our special manufacturing processes, this whiskey has all the characteristics of a one year old whiskey."

"Distilled from a scientifically controlled fermentation under laboratory control."

* * * *

Sec. 62. *Mandatory Statements.*

* * * *

(d) Percentage of Neutral Spirits and Name of Commodity.—

(1) In the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification, if neutral spirits have been used in the production thereof, there shall be stated the percentage of neutral spirits so used and the name of the commodity from which such neutral spirits have been distilled. The statement of percentage and the name of the commodity shall be made in substantially the following form: "....% neutral

47 A

spirits distilled from grain;" or "....% neutral
spirits distilled from cane products;" or "....%
neutral spirits distilled from fruit;" or "....%
grain (cane products), (fruit), neutral spirits."

* * * *

Sec. 64. *Prohibited Statements.*—

(a) The advertisement of distilled spirits shall not
contain—

(1) Any statement that is false or untrue in
any particular or that, irrespective of falsity,
directly or by ambiguity, omission, or inference,
or by the addition of irrelevant, scientific, or
technical matter, tends to create a misleading
impression.

* * * *

Sec. 82. *Effective Date.*—Except as otherwise provided
herein, these regulations are effective on and after the
first day of January, 1936.

48 A

Govt. Ex. 8

Civil Action 263-63

SEAGRAM v. DILLON

FEDERAL ALCOHOL CONTROL ADMINISTRATION

Washington, D. C.

MISBRANDING RULINGS NOS. 49 to 66

and

SUPPLEMENTS 2 and 3

November 20, 1934.

AM-275

11/20/34

EXPLANATORY STATEMENT

The several codes of fair competition for the alcoholic beverage industries each prohibit the publication or dissemination in any manner of any false advertisement of alcoholic beverages, and the sale or other introduction into commerce of alcoholic beverages that are misbranded within the meaning of the Federal Food & Drugs Act, or that do not conform to standards of fill, standards of identity, standards of quality or label requirements prescribed by regulations of the Federal Alcohol Control Administration.

The Administration now has in force regulations relating to the standards of identity, standards of fill and

label requirements for distilled spirits. For the information of members of the alcoholic beverage industries the Administration is publishing from time to time a series of mimeographs entitled "Misbranding Rulings". The series includes rulings and interpretations, formal and informal, and other materials of general interest relating to the administration of the said code provisions and regulations. These rulings and interpretations, except where specifically indicated, have not been acted upon by the Board of the Federal Alcohol Control Administration. They, therefore, do not modify the said code provisions or regulations and are subject to withdrawal or modification by subsequent action of the Board of the Federal Alcohol Control Administration.

Each ruling is numbered in sequence and may be referred to as "Misbranding Ruling No.".

* * * *

RULING NO. 57—Age statements for Vodka and other distilled spirits specifically named in Misbranding Ruling No. 4 may not be stated upon label, except when manufacturing and bottling dates required to be stated by State law or regulation, and then only in State so requiring.

Letter of General Counsel's Office
October 9, 1934.

The Administration is in receipt of your letter of * * *, referring to Misbranding Rulings Nos. 1 to 15 issued by this Administration, with particular reference to the ruling that age, maturity, or similar statements or representations as to Vodka are misleading and are prohibited. The attention of the Administration is directed to a re-

quirement of the State of New York that labels of distilled spirits bear the date of manufacture and bottling.

In the opinion of the Administration, the distilled spirits specifically named in this ruling, including Vodka, are types of distilled spirits whose quality does not improve with aging; and the ruling in question was predicated upon the ground that, being meaningless, representations of age for these distilled spirits would be misleading to the consuming public.

The Administration of course is aware that a few States have, by statute or regulation, required all distilled spirits to bear upon labels the date of manufacture and the date of bottling. In the enforcement of the provisions of the various Codes of Fair Competition and the revised Labeling Regulations, this Administration, as a matter of policy, will interpose no objection to the labels of distilled spirits offered for sale in these several States bearing the required manufacturing and bottling dates.

In cases, however, of sales made in those States not requiring the manufacturing and bottling dates to appear upon bottled distilled spirits, the Administration requires the labels of such distilled spirits to be free of age representations for Vodka and the other distilled spirits specifically named in Misbranding Ruling No. 4.

* * * *

51 A

Govt. Ex. 9

Civil Action 263-63

SEAGRAM v. DILLON

FEDERAL ALCOHOL CONTROL ADMINISTRATION
Washington, D. C.

REGULATIONS

Relating to

FALSE ADVERTISING AND
MISBRANDING OF DISTILLED
SPIRITS

Issued May 13, 1935
(With Appendices)

United States
Government Printing Office
Washington: 1935

SEC. 38. *Coloring, Flavoring, and Blending Materials—*

(a) The presence in any distilled spirits of any coloring, blending, smoothing, or flavoring material (including malt whiskey used in blending other types of whiskey) need not be indicated unless such material causes the product to simulate another class or type of distilled spirits: *Provided*, That if the aggregate amount of coloring, blending, smoothing, or flavoring materials in any distilled spirits other than cordials, liqueurs, gins, gin fizzes, high-balls, bitters, and such similar distilled spirits

as may be specified by the Administration from time to time, is in excess of $2\frac{1}{2}\%$ by volume of the distilled spirits contained in any bottle, then the name and amount in percent of volume of each such material shall be stated.

(b) The presence of beading oil in any type of whiskey shall be stated.

SEC. 39. Age—¹¹

(a) *Statement of Age and Percentage for Whiskey.*—There shall be stated in the case of whiskey (except Scotch, Irish, and Canadian and Blended Scotch, Irish, and Canadian whiskey, as defined in Article II, section 21, class 2, and except straight whiskey bottled under the Bottling in Bond Act of the United States, in which cases statement of age shall be optional) the following:

- (1) The age of all types of straight whiskey.
- (2) The age of neutral whiskey when unmixed with other types of whiskey or other distilled spirits.

The statement of age in cases under paragraphs (1) and (2) shall be as follows: "This whiskey (neutral whiskey) is — years (and/or months) old." If more than a year in age, months in excess of a year may be omitted.

(3) In case of any of the types of blended whiskey and in case of spirit whiskey, the age of the straight whiskey (or if there be two or more straight whiskeys, then of the youngest straight whiskey) together with the percentage by volume of each of the following: the straight whiskey or whiskeys, the neutral spirits, and the neutral whiskey therein.

¹¹ For an interpretation of the requirements as to age and percentage standards, see F. A. C. A. misbranding ruling no. 4, issued Aug. 30, 1934, and misbranding ruling no. 75, issued Dec. 8, 1934.

The statement of age in cases under paragraph (3) shall be as follows, according to the number of straight whiskies used:

If one only: "The straight whiskey in this product is — years (and/or months) old"; or if more than one: "The straight whiskeys in this product are — years (and/or months) or more old", the blank in each form to be filled with a figure correctly stating an age not in excess of that of the youngest straight whiskey. If more than a year in age, months in excess of a year may be omitted.

If the whiskey is a blend of straight whiskeys, the label, in addition to so stating the age, may state (1) the aggregate percentage and minimum age of the older whiskeys, or (2) the average age of all whiskeys in the blend, or (3) the aggregate percentage and average age of the older whiskeys, the average in either case being an average weighted by volume.

(b) *Use of the Word "Old", or Other Representations as to Age.*—If any age, maturity, or similar representation (including words or devices in any brand name or mark) is made relative to any distilled spirits (except neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs, and bitters), the age shall also be stated on all labels where such representation appears, and in script, type, or printing substantially as emphatic and conspicuous as such representation. Age, maturity, or similar representations as to neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs, and bitters, are misleading, and shall not appear upon any label, except that the use of the word "old" or other word denoting age, appearing as part of the brand name, shall not be deemed to be an age representation in the case of such distilled spirits, or in the case of distilled spirits

bottled in bond under the Bottling in Bond Act of the United States. As to all other distilled spirits, the word "old" or other word denoting age, appearing as part of the brand name, shall be deemed to be an age representation unless the word "brand" appears in direct conjunction with such brand name in letters of equally conspicuous color and at least one-half the size of the type in which such brand name is printed.

(c) *Blended Scotch Type Whiskey*.—Notwithstanding the provisions of subsection (a) above, there shall be stated, in case of blended Scotch type whiskey, the age of the youngest of the whiskeys if any of the malt whiskeys in the product are less than three years old. If all the malt whiskeys in the product are three years or more old, the age may (but need not) be stated. The statement of age shall be in the following form: "The malt whiskey in this product is — years (and/or months) or more old", the blank to be filled in with a figure correctly stating an age not in excess of that of the youngest malt whiskey. If more than a year in age, months in excess of a year may be omitted.¹²

SEC. 40. *General requirements*—

(a) *Contrasting Background*.—All labels shall be so designed that all the statements thereon required by this article are readily legible under ordinary conditions, and all such statements shall be on a contrasting background.

(b) *Size of Type*.—All statements required on labels by this article shall be in script, type, or printing not smaller than eight-point face caps, except that if contained among other descriptive or explanatory reading matter, the script, type, or printing of all required material shall be of a size substantially more conspicuous and emphatic than such other descriptive or explanatory reading mat-

¹² As amended on Mar. 14, 1935, effective June 1, 1935. Prior to this amendment subsection (c) did not appear in this Article.

ter; *Provided*, That in the case of labels on bottles having a capacity of less than one-half pint, such script, type, or printing thereon need not be in eight-point face caps, but shall be readily legible under ordinary conditions. All statements of the type of distilled spirits shall be in script, type, or printing substantially as emphatic and conspicuous as the statement of the class to which it refers, and in direct conjunction therewith.

(c) *English Language*.—All the requirements of this article shall be stated on all labels in the English language: *Provided*, That . . .

[Filed May 27, 1963]

* * * *

MOTION TO DISMISS OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT

Comes now, National Distillers and Chemical Corporation, Schenley Industries, Inc. and Stitzel-Weller Distillery, Inc., (hereinafter referred to as the Intervening Defendants), and by their attorneys, move this Court to dismiss the Complaint on the ground that it fails to state a cause of action upon which relief can be granted.

In the alternative, the intervening defendants move the Court, pursuant to Rule 56, Federal Rules of Civil Procedure, and Rule 9(h) of this Court, for summary judgment in its favor on the ground that there is no genuine issue of material fact and they are entitled to judgment as a matter of law. This motion is based upon the entire record in this case.

WHITEFORD, HART, CARMODY & WILSON

By
Frank H. Strickler
815 - 15th Street, NW.
Washington 5, D.C.

COOKE AND BENEMAN

By
George R. Beneman
1632 K Street, N.W.
Washington 6, D.C.

By
John D. McElroy
425 - 13th Street, N.W.
Washington, D.C.
Attorneys for Intervening Defendants

[Filed May 27, 1963]

* * * *

STATEMENT OF INTERVENING DEFENDANTS
UNDER RULE 9(h) OF THIS COURT

In compliance with Rule 9(h) of this Court, the intervening defendants set forth the material facts as to which there can be no genuine issue. Each fact set forth is substantiated by the record in the case.

1. The plaintiff, a corporation organized and existing under the laws of Indiana, is engaged in the business of distilling, blending and bottling alcoholic beverages for sale throughout the United States.

2. The defendants are government officials charged with the duty of administering the Federal Alcohol Administration Act (27 U.S.C. §§ 201-212; 40 Stat. 977).

3. The intervening defendants are corporations engaged in the business of distilling, blending and bottling alcoholic beverages for sale throughout the United States and they compete with the plaintiff and with each other in this business.

4. For more than four years the plaintiff has produced grain neutral spirits which it stored in barrels which had previously been used for aging plaintiff's whiskies.

5. That plaintiff is using such neutral spirits in a blended whiskey which is being marketed under the name of "Calvert Extra".

6. That neutral spirits or alcohol are distilled spirits distilled at or above 190° proof.

7. That blended whiskey is a mixture which contains at least 20 percent (20%) by volume of 100° proof straight whiskey and, separately or in combination, whiskey or neutral spirits, if such mixture at the time of bottling is not less than 80° proof.

8. That plaintiff, sought a certificate of Label Approval for its "Calvert Extra" Blended Whiskey as alleged in paragraph 9 of the complaint.

9. That defendant Avis denied plaintiff's application for the reasons set forth in paragraph 11 of the complaint.

10. That Sections 5.39(d) and (e) (5) of the regulations adopted following public hearings prohibit "age, maturity, or similar statements or representations as to neutral spirits" because they "are misleading".

11. That Exhibit Nos. 1-17, which are attached to the defendants' motion for summary judgment are accurate copies of documents contained in the defendants' records.

WHITEFORD, HART, CARMODY & WILSON

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 Attorneys for Intervening Defendants

* * * *

[Filed October 16, 1963]

* * * *

ORDER

Upon consideration of the Motion for Leave to Intervene as defendants filed herein by National Distillers and Chemical Corporation, Schenley Industries, Inc., and Stitzel-Weller Distillery, Inc., the opposition of the plaintiff thereto and the full argument of the parties in open Court and it appearing to the Court that said Motion should be granted under Rules 24(a)(2) and 24(b) of the Federal Rules of Civil Procedure, it is by the Court this 16th day of October, 1963,

ORDERED that National Distillers and Chemical Corporation, Schenley Industries, Inc., and Stitzel-Weller Distillery, Inc. be and they are hereby granted leave to intervene as parties defendant herein.

/s/ J. McGarraghy
Judge

* * * *

[Filed October 16, 1963]

* * * *

**GOVERNMENT DEFENDANTS' MOTION TO QUASH
AND FOR OTHER PROTECTIVE ORDER**

Come now the Government defendants by their attorney, the United States Attorney for the District of Columbia, and respectfully move the Court for a protective order under Rule 30 (b), F.R.C.P., as hereinafter follows:

Defendants pray that such order quash the subpoena and notice of taking of deposition served by plaintiff upon Dr. Alex P. Mathers, Chief, National Office Laboratory, Alcohol and Tobacco Tax Division, Internal Revenue Service, calling for him to depose in this cause on October 17, 1963. Alternatively, defendants pray that such order stay the taking of Dr. Mathers' deposition, and the effectiveness of the subpoena served upon him, and any other discovery procedure to which plaintiff may resort in relation to defendants or any of their subordinates, pending further order of this Court, following upon the Court's disposition of defendants' pending motion to dismiss and alternative motion for summary judgment.

Defendants further pray that the Court order a temporary stay as to any discovery pending its determination of the present motion for protective order.

In support of this motion, defendants aver:

1. Defendants verily believe that their motion to dismiss and alternative motion for summary judgment are well founded, and that this Court will dismiss this action upon the hearing of the said motions.

2. This case involves solely questions of law. Plaintiff challenges only administrative action taken under a published regulation, and claims that, if the regulation has been properly applied in its case, the regulation is invalid.

3. The regulation in question was issued pursuant to statutory authority vested in the Secretary of the Treasury. As required by the statute, public notice was duly given, and a quasi-legislative hearing conducted, before the regulation was promulgated. The continued existence of the regulation was made the subject of like quasi-legislative hearings on two subsequent occasions, at which representatives of the plaintiff, as well as others in the Distilled Spirits Industry, were given full opportunity to present their views. And the determination was reached by the delegate of the Secretary of the Treasury, in consideration of all the representations made at such quasi-legislative hearings, that the regulation should remain in full force and effect.

4. This case involves *solely* judicial review of the aforesaid Agency action; the *pertinent* Agency records—relating both to the challenged administrative action taken upon plaintiff's application, and the conduct of the quasi-legislative hearings, etc., leading to promulgation and retention in force of the challenged regulation—have been duly certified and placed before the Court for its review in this cause.

5. Plaintiff is not entitled to go beyond those administrative records in these review proceedings; and there is no warrant for this Court to conduct any hearing *de novo* in performing its proper judicial review function in this case.

6. Any consideration this Court might give to evidence taken *dehors* the administrative records in conducting its judicial review would violate the doctrine of exhaustion of administrative remedies.

7. Accordingly, no good cause exists here for discovery; and in any event discovery should await the Court's disposition of defendants' pending motion to dismiss and for summary judgment.

In further support of this motion, defendants herewith submit a memorandum of points and authorities.

/s/ David C. Acheson
DAVID C. ACHESON
United States Attorney

/s/ Charles T. Duncan
CHARLES T. DUNCAN, Principal
Assistant United States Attorney

/s/ Joseph M. Hannon
JOSEPH M. HANNON
Assistant United States Attorney

/s/ Gil Zimmerman
GIL ZIMMERMAN
Assistant United States Attorney

* * * *

63 A

[Filed November 8, 1963]

* * * *

ORDER

This cause came on to be heard upon the defendants' and intervenors' motions to quash and for other protective order, and upon consideration of said motions, and the memoranda of points and authorities filed in support thereof and in opposition thereto, and the argument of counsel, it is by the Court this 8th day of November, 1963,

ORDERED that the depositions which have been noticed by the plaintiff in this case be and the same hereby are suspended and stayed until disposition by this Court of defendants' and intervenors' pending motions to dismiss and alternative motions for summary judgment.

/s/ J. McGarraghy
Judge

* * * *

[Filed November 27, 1963]

* * * *

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

EDGAR M. BRONFMAN, being duly sworn, says:

I am President of Joseph E. Seagram & Sons, Inc. (hereafter: Seagram) the plaintiff in this action. I have been President of Seagram since 1957. I am responsible for the production, sales and merchandising of the various brands of alcoholic beverages manufactured by Seagram including those brands which are produced and sold by Calvert Distillers Company, which is a division of The

House of Seagram, Inc. a wholly owned subsidiary of Joseph E. Seagram & Sons, Inc.

From its inception Seagram has been engaged in a constant effort not only to maintain the highest standard of quality for the products it sells but also to improve those products. Seagram maintains three types of laboratories at five locations (New York, New York; Lawrenceburg, Indiana; Louisville, Kentucky; Relay, Baltimore, Maryland; and Dundalk, Baltimore, Maryland). The first type of laboratory (hereafter: Research Laboratory) employs 46 persons (36 of these are scientists, including Ph.D's in bacteriology, bio-chemistry, organic chemistry, organic physical chemistry, and plant physiology) and is engaged in pure research into the composition and nature of all kinds of alcoholic beverages. A photograph of the interior of the Research Laboratory is attached as Exhibit A.

The second group of laboratories (Control Laboratories) employs about 60 persons (including chemists and other experts) who make a day to day analysis of all the ingredients (raw materials to finished product) used in Seagram products to be sure they measure up to the highest standard. A photograph of the interior of one of these laboratories is attached as Exhibit B.

The third group of laboratories is a Quality or Organoleptic Laboratory employing about 52 persons (including chemists and other technicians trained in tasting and smelling alcoholic beverages). A photograph of the interior of one of these laboratories is attached as Exhibit C. These technicians taste and smell samples of the alcoholic beverages manufactured by Seagram at the time the spirits are first distilled, at regular intervals throughout the period these spirits are stored in barrels and then again just before the spirits are actually blended and bottled. These tests are thorough and exhaustive to insure the highest quality.

No other manufacturer of alcoholic beverages to the best of my knowledge maintains such a large and highly skilled staff of technical experts.

In 1949 the Seagram Research Laboratory inaugurated a project to determine what happened to distilled spirits stored in wood. An effort was made to determine what additional chemical substances were formed as a result of such storage to learn with a greater degree of scientific precision what is the effect of the interaction of the distilled spirits with the wood of the barrel.

As part of this project a study was made of the effect on neutral spirits of storage in re-used oak barrels. The results of these studies conclusively indicated that stored neutral spirits developed significant flavor differences from neutral spirits not stored. In addition these spirits lost their rawness and became smoother and more mellow comparable to the way that whiskey does as the result of storage. We also learned that these flavor differences varied depending on the type of neutral spirit which was used as well as the period of storage. Certain specially distilled neutral spirits when stored for longer periods of time became particularly smoother, softer, more palatable and developed highly desirable flavor characteristics.

The Research Laboratory reported that there was an increase in the congeners (such as esters, aldehydes, acids and fusel oil) contained in the neutral spirits. This increase in congeners was a result of the storage in the re-used cooperage. These changes were comparable to the changes which were observed in whiskey and other distilled spirits which were similarly stored.

In about 1958 I consulted with our Research and Organoleptic Laboratory with reference to this work. I personally tasted and smelled hundreds of samples of neutral spirits of various distillations which had been stored for varying periods of time in re-used oak barrels.

At that time I was impressed by the significant softening and smoothening of the neutral spirits which had been stored in the re-used oak barrels.

At that time we felt that there was a developing consumer preference toward smoother and lighter alcoholic beverages. Therefore we were particularly interested in developing a smoother neutral spirit in order to make a lighter blended whiskey.

I discussed these studies by our Research and Organoleptic Laboratories with the Seagram Vice President in charge of Quality Control, Frederick W. Klayer. Mr. Klayer reported to me that these studies conclusively established that by storage of specially distilled neutral spirits we could produce a neutral spirit which was notably more flavorful and smoother. Inasmuch as most American blended whiskey consists of approximately 65% grain neutral spirits we felt that the use of these stored neutral spirits in a blend of whiskey would produce a different, lighter and highly desirable blend. We made numerous taste and smell tests in which we blended stored neutral spirits with straight whiskeys in an effort to determine the most desirable blend which we could produce. It was at this time that we finally decided to produce a new blend of whiskey which would contain neutral spirits which had been stored for what we considered the optimum period which is about four years.

The studies conducted by our Research Laboratory in conjunction with our Quality and Control Laboratories showed that distillation of neutral spirits by a single batch process rather than by the traditional multicolumn continuous process would enable us to distill a neutral spirit which would particularly improve by storage. This process enabled us to better control the distillation of the neutral spirits so that we could retain those congeners which we felt would, after storage, be desirable from a

flavor standpoint. In order to arrive at the exact neutral spirit which we would use for storage in oak barrels, our Research Laboratory and Quality or Organoleptic Laboratories conducted literally thousands of tests on neutral spirits each distilled in slightly different ways to contain slightly different ratios of flavor intensities and each stored for varying periods of time. All of these samples were analyzed by our laboratories and by the skilled persons in our various divisions. A valuation was then made of the manner in which each of these stored neutral spirits would interact with the straight whiskeys with which they were blended so that we could determine just exactly what the new blend of whiskey would taste like and could decide exactly what ingredients would be most apt to produce a flavorful blend.

Finally after thousands of samples of neutral spirits were distilled, stored and analyzed we decided that a particular special distillation process produced a spirit which in the opinion of all of our experts would improve by storage in what we considered to be a highly desirable manner. Of course to a large extent these judgments are subjective and depend upon a value judgment as to the flavor characteristics which are most desirable in connection with blending whiskey. These judgments are made by Seagram personnel based upon their long experience in tasting and smelling alcoholic beverages and their knowledge of what the American public desires as far as the taste and smell of alcoholic beverages is concerned.

I personally participated in these tests. In fact, I made the final decision on the neutral spirit which we would use for storage preparatory to the production of the new blend of whiskey. My decision was based on taste and smell tests and judgments of many distillates of neutral spirits before, after and during storage. This extensive experimentation in the storage of neutral spirits was a costly operation for Seagram. In my opinion the research

work which was performed which finally culminated in the product "Calvert Extra" cost Seagram approximately \$490,000.

In 1958 we began to set aside large quantities of the specially distilled neutral spirits which we had decided to store in re-used oak barrels. Our plan at that time was to store these neutral spirits for a period of approximately four years since we had found that this was the optimum length of time for storage of neutral spirits. We planned at the end of four years to blend these neutral spirits with the various straight whiskeys of Calvert and to market a new and improved blend of whiskey in about 1962.

It should be noted that the usual practice with reference to neutral spirits is to put them in huge tanks some of which hold as much as 500,000 gallons each. The neutral spirits are then blended practically immediately with whiskeys and are not stored. This practice is practically universal in the industry and to the best of my knowledge is followed by two of Seagram's competitors in this proceeding. (It is my understanding Stitzel-Weller does not use neutral spirits). This practice (as pointed out *infra*) is an infinitely cheaper way of storing and handling neutral spirits.

Each of the re-used barrels in which we stored the specially distilled spirits has a capacity of approximately 50 gallons. The barrels themselves are worth from \$2 to \$4. It is apparent that by putting the neutral spirits in these thousands of oak barrels, Seagram incurred a huge additional production expense. This additional expense amounted to approximately \$1,469,000.

Further in order to store the neutral spirits in these barrels it was necessary for us to lease and buy warehouses. I estimate that the additional warehouse space and attendant expenses (delivery, handling, insurance,

trucking, property and other taxes) cost Seagram about \$5,501,000. It would not have been necessary to spend this money if the neutral spirits had been used in their raw state in blending whiskey as is usually done. Attached hereto as Exhibit D is a photograph of some of the barrels in one of the warehouses showing the manner in which the neutral spirits were stored. All of the neutral spirits used in Calvert Extra were stored in oak barrels in this manner for at least four years. Attached as Exhibit E are photographs of some of the additional warehouses which Seagram had to acquire in order to accommodate the huge quantities of neutral spirits to be stored.

An additional item of expense in connection with this program is due to the fact that neutral spirits when stored sustain on the average a 3% loss of content per barrel per year through evaporation and leakage, a loss of approximately 12% over the four year period. This loss, of course, does not occur when the neutral spirits are used immediately in blending whiskey after distillation. It is estimated that the expense to Seagram as a result of this evaporation loss was at least \$760,000.

After the spirits had been stored for approximately four years we began to blend these spirits with Calvert's fine whiskeys to produce the new blend of whiskey which we have called "Calvert Extra". In my opinion and in the opinion of all of the technical personnel employed by Seagram the final product Calvert Extra is a finer and smoother blend of whiskey because of the use of these neutral spirits which were stored for at least four years. Calvert Extra had been advertised as a "soft" whiskey. This softness is in large part due to the fact that the neutral spirits used contribute a delightful flavor of their own, the result of a special distillation process, and the storage of these neutral spirits for a period of more than

four years in re-used cooperage—barrels previously used for storing Calvert's fine whiskeys.

The resulting product is, in my opinion, a soft blend of whiskey which contains flavor characteristics which could not be produced without storage of these spirits in re-used oak barrels for at least four years.

It has cost Seagram approximately \$8,000,000 to produce and develop this new blend of whiskey. By means of this expenditure we believe that Seagram has made a significant contribution to the art of blending whiskey. A large part of this cost is attributable to the storage of the neutral spirits for at least four years.

The action of the defendants in this case has prevented Seagram from telling the consumer why this blend is better; it has prevented Seagram from stating on the label of Calvert Extra the significant true fact about Calvert Extra: that the specially distilled neutral spirits in Calvert Extra contribute a delightful flavor of their own because of storage for at least four years in re-used cooperage. If the neutral spirits had not been stored for at least four years they would not have acquired the unique taste and odor characteristics or the mellowness or softness which they have and which they contribute to Calvert Extra.

Seagram is now and has suffered irreparable injury because the Government has prevented Seagram from telling the consumer of the storage of its neutral spirits which enable it to produce this finer blend of whiskey.

.....

Sworn to before me this
26th day of November, 1963

.....

[Filed November 27, 1963]

* * * *

AFFIDAVIT

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

FREDERICK W. KLAYER, being duly sworn, says:

I am Vice President in charge of all distillery production for Joseph E. Seagram & Sons, Inc. (hereafter: Seagram). I have held this position for the last three years. For more than twenty years prior to that I was distiller, chief blender and held various other positions for all brands manufactured by Seagram. I have a Masters Degree in Chemistry.

Seagram has three types of laboratories at its five locations. These laboratories are more fully described in the affidavit of Edgar M. Bronfman submitted herewith. I am directly in charge of these laboratories and have for many years supervised their activities.

One of the reasons for maintaining this elaborate and complete set of laboratories has been to acquire more detailed and precise knowledge (chemically and organoleptically) of alcoholic beverages in an effort to improve and maintain the high standard of quality of Seagram products.

I make this affidavit to demonstrate that by taste and odor tests neutral spirits do significantly improve by storage in re-used cooperage and that the Government's contention that neutral spirits are "neutral" is false.

It is well known that even without storage there can be a wide difference in the taste and odor of neutral spirits. Submitted herewith as Exhibit F is a bottle containing

neutral spirits (conforming in all respects to the definition contained in the Government regulations). This sample was distilled in order to retain a substantial amount of congeners or taste producing substances. This sample of Heavy neutral spirits has a decided and pronounced odor and taste.

Submitted as Exhibit G is a sample of neutral spirits distilled in order to remove substantially all congeners. This sample of Light neutral spirits is substantially "neutral" and is therefore greatly different from Sample F in taste and smell. The greater number of congeners which are left in the neutral spirits by the original distillation, the greater the changes effected by storage. The types and combinations of congeners retained in neutral spirits will determine the flavor characteristics of the neutral spirits after storage.

Since most American blended whiskey is composed of 65% neutral spirits, the importance of improving the flavor and mellowing the neutral spirits used is readily apparent. It is this basic fact which caused Seagram to spend millions of dollars on a program of storing neutral spirits preparatory to blending the new lighter blended whiskey, Calvert Extra.

It has, of course, long been known that whiskey improves by storage. Notable among the changes occurring during the storage of whiskey is an increase in the concentration of the congeners, i.e., acids, esters and solids. It is generally recognized that these increases result from three principal types of reaction which occur during storage: (1) extraction of complex wood constituents by the liquid; (2) oxidation of the original components in the liquid and other material extracted from the wood; and (3) reaction between the various organic substances in the liquid resulting in the formation and increase in the amount of congeners. These changes remove the raw

pungent taste and improve the taste and aroma of whiskey.

Although grain neutral spirits are manufactured from the same raw materials and in a manner quite similar to that used for whiskey, it has not been customary to store them in barrels since it was believed that they would not improve by storage. In fact in the 1930's it was believed by the industry that the best spirits for blending were spirits which were as neutral as possible. In the years immediately following repeal Seagram and other distillers spent considerable sums of money developing and installing distillation equipment which would produce the most neutral type of neutral spirit. This equipment was quite elaborate and the method of distillation was by multicolumn continuous stills. Seagram installed and indeed still uses these multicolumn continuous stills which are designed to produce as pure a neutral spirit as possible. It is primarily for these reasons that there was a dearth of information with reference to the storage of neutral spirits for extended periods prior to the 1950's when Seagram began its experiments in the storage of neutral spirits.

In the 1950's Seagram became increasingly aware of the possibility of improving neutral spirits by storage in re-used cooperage. Since the chief difference between neutral spirits and whiskey was the proof at which they are distilled, we felt that there was no logical reason why grain neutral spirits (made of the same raw materials as whiskey) should not improve by storage in much the same way as whiskey.

As outlined in the affidavit of Mr. Bronfman submitted herewith we conducted literally thousands of experiments to distill and store a neutral spirit which in our judgment would have the most desirable flavor after storage. This flavor is produced by often minute quantities of delicate

chemical substances which, even yet, are not fully known to science, but which increase during storage to such extent as significantly to change and improve the taste and odor of the neutral spirits. The affidavit of Dr. Adams submitted herewith sets forth a chemical analysis and explanation of these differences.

After extensive sampling and testing it was decided by Seagram that a special and particular distillate of neutral spirits developed (in our opinion) highly desirable taste and odor characteristics by storage and in addition became mellow and softer.

This distillate was produced in the manner described in the affidavit of Mr. Bronfman, by what is known as a batch process rather than a continuous process. A sample of this specially distilled neutral spirit which we decided to store in quantity preparatory to the introduction of a new blend of whiskey is submitted herewith as Exhibit H. It is submitted that this sample is readily distinguishable from Samples F and G yet all are neutral spirits within the Government definition.

We then placed these specially distilled neutral spirits in re-used oak barrels. Thereafter I personally, as well as members of our laboratory staff made taste and odor tests of these spirits in storage every six months to determine whether they were improving. Mr. Bronfman, himself, made periodic tests and discussed them with me and other members of our laboratory staff.

In our opinion the spirits greatly improved in taste and odor throughout the storage period and became softer, smoother and mellow. After four years of storage we decided the spirits had reached their optimum peak of flavor perfection and decided that they were ready for blending. A sample of the specially distilled neutral spirits (Exhibit H) after storage for four years in re-used oak barrels, is attached as Exhibit I.

75 A

It is submitted that this sample is significantly different from Samples F, G and H not only with respect to taste, odor and mellowness but also with respect to color.

In my opinion based on years of experience in the field of alcoholic beverages for Seagram, which is one of the largest producers of alcoholic beverages in the world, these specially distilled neutral spirits after storage contributed a unique and delightful taste of their own to the new blended whiskey, "Calvert Extra". In addition they made the final blend smoother, mellower and softer than it would have been if the neutral spirits had not been stored for at least four years in oak barrels previously used for storing Calvert's fine whiskeys.

.....
Sworn to before me this
26th day of November, 1963

.....

[Filed November 27, 1963]

* * * *

AFFIDAVIT

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

STUART L. ADAMS, being duly sworn, says:

I am Technical Director and as such have had direction of the activities of the Research Department for Joseph E. Seagram & Sons, Inc. (hereafter: Seagram). I am in charge of the Research Laboratory maintained by Seagram which is more fully described in the affidavit of Mr. Bronfman submitted herewith. I have a Ph.D degree in Bacteriology and Bio-Chemistry and have had overall direction of Research for Seagram for 13 years.

I make this affidavit to set forth the facts with reference to the chemical composition of various distillates of neutral and other distilled spirits and to demonstrate that a chemical analysis establishes a significant change in neutral spirits by storage in re-used cooperage.

These changes result from (1) extraction of complex wood constituents by the liquid; (2) oxidation of the original components in the liquid and the material extracted from the wood; and (3) reaction between the various organic substances in the liquid resulting in the formation and increase in the amount of congeners. They do not result to any significant extent from an absorption of any residual whiskey which might be in the staves of the barrels.

The following is a chemical analysis of the significant congeners in a typical sample of the specially distilled neutral spirit used in Calvert Extra *before* storage and after storage for at least four years.

77 A

Congeners	Before Storage	After Storage
(Grams/100 liters)		
Solids	.0	17.0
Total Acids	.2	9.0
Fusel Oil	.3	1.0
Esters	.2	4.0
Aldehydes	.5	1.2

Notable among the observed chemical changes are increases in the concentration of acids, esters and solids. These increases in concentration are similar to those which occur during the storage of whiskey and impart to the grain neutral spirits a distinctive and different taste from that of freshly distilled grain neutral spirits.

There is a significant increase in esters which are known to impart a fruity flavor. The increase in acids imparts a variety of different and desirable flavors. The substantial increase in solids results in large part from extraction from the barrel. These solids add a woody flavor which is considered desirable in the blending of whiskey.

Our research has also shown that during the storage of neutral spirits the ethyl alcohol in the spirits reacts chemically with the lignin in the wooden barrels to produce flavorful substances of which vanillin and syringaldehyde have been identified. These two substances contribute a softening and mellowing effect on the taste of the neutral spirits.

While the quantitative increase in these substances is comparatively small, these are substances which give flavor to the neutral spirits and the changes set forth above quite clearly cause a significant change and improvement in the taste and odor of neutral spirits.

It is interesting to observe that these chemical changes in neutral spirits by reason of storage are comparable to the changes in whiskey by storage. For example a

chemical analysis of Scotch whiskey compared with the neutral spirits used in Calvert Extra is as follows:

Congeners	Neutral Spirits		Scotch	
	Scotch Before Storage	Spirits Before Storage	After Storage for Four Years	Neutral Spirits After Storage for Four Years
(Grams/100 liters)				
Solids	.0	.0	14.5	17.0
Total Acids	.7	.2	4.1	9.0
Fusel Oil	52.0	.3	56	1.0
Esters	3.5	.2	4.1	4.0
Aldehydes	.7	.5	2.12	1.2

The increase in the solids, acids, esters and aldehydes in the neutral spirits is even more significant in the neutral spirits because the large quantity of fusel oil in the whiskey tends to obscure these more delicate flavors.

It is true that bourbon whiskey contains greater quantities of each of these congeners than either neutral spirits or Scotch whiskey. However this does not detract from the fact that there is an important and significant increase in the congeners in the delicate neutral spirits. A smaller quantitative increase in congeners in neutral spirits has a greater effect on their taste and odor because of the absence of the large quantity of fusel oil in neutral spirits.

In my opinion there is a highly significant change in the chemical composition of the specially distilled neutral spirits used in Calvert Extra by storage for four years in re-used cooperage which has a decided and beneficial effect on the taste and odor of such spirits.

Sworn to before me this
26th day of November, 1963

[Filed December 6, 1963]

* * * *

PLAINTIFF'S STATEMENT OF GENUINE ISSUES
NECESSARY TO BE LITIGATED PURSUANT TO
RULE 9(h)

Plaintiff, pursuant to Rule 9(h), asserts that the following genuine issues of fact must be litigated and preclude the granting of summary judgment:

- (1) Do the specially distilled neutral spirits used in Calvert Extra significantly improve by storage for at least four years in re-used cooperage and as a result thereof do they impart a unique and delightful taste of their own to Calvert Extra?
- (2) Is it likely to mislead the consumer if Seagram states on its label for Calvert Extra that the specially distilled neutral spirits used therein have been stored for at least four years in re-used cooperage?
- (3) Is the statement that the specially distilled neutral spirits used in Calvert Extra have been stored for at least four years in re-used cooperage a statement with reference to the age of the neutral spirits or a similar statement within the meaning of 27 C.F.R. 5.39(d)?
- (4) Is it arbitrary and capricious for defendants to order Seagram to delete from the Calvert Extra label the language with reference to the fact that the specially distilled neutral spirits used in Calvert Extra have been stored for at least four years in re-used cooperage?
- (5) Is the defendants' action in deleting certain language from plaintiff's label causing plaintiff irreparable and unjustifiable injury?

The plaintiff controverts the following factual assertions in the Intervenor's Statement Under Rule 9(h):

- (1) "10. That Sections 5.39(d) and (e) (5) of the regulations adopted following public hearings prohibit 'age, maturity, or similar statements or representations as to neutral spirits' because they 'are misleading.'"

Plaintiff denies that the aforesaid statement is a material fact and asserts that instead it is a legal conclusion. Furthermore, plaintiff asserts that the statutorily required public hearing before the promulgation of said regulations did not contain any information or evidence to support said regulations or upon which the Secretary of the Treasury could make the required finding before promulgation of such regulations.

Rule 9(h) of this Court requires a party moving for summary judgment to file "a statement of material facts as to which the moving party contends there is no genuine issue." This rule provides a method by which the Court can readily in one document ascertain the facts upon which a party contends he is entitled to a judgment as a matter of law. The rule likewise allows a party opposing a motion for summary judgment to set forth all facts as to which it is contended there exists a genuine issue necessary to be litigated; however, if the opposing party does not controvert the facts of the moving party then the Court may assume them admitted.

Thus under the scheme of Rule 9(h) the moving party first must set forth the material facts on which he relies and the opposing party must controvert them or they are considered admitted. The defendants in the present motion, however, have failed to comply with this rule and merely state:

Defendants adopt . . . the facts as set forth in their memorandum of points and authorities. [Defendants' Statement of Material Facts]

The failure of the defendants to comply with the rule imposes a burden on the Court and makes compliance by the plaintiff difficult in view of the length of defendants' memorandum. Plaintiff has examined with care these points and authorities and in good faith based on material evidence in its possession controverts the following facts:

- (1) "The very name, neutral spirits or alcohol, implies the absence of any characteristics that would cause such distilled spirit to age or mature." (Defendants Points & Authorities, p. 8)

Plaintiff maintains that there is no such thing as a true neutral spirit, and that indeed grain neutral spirits do improve and change during storage in charred, used oak cooperage in a manner similar to the change which occurs in whisky by reason of storage. Plaintiff will demonstrate this change by chemical and organoleptic (taste and smell) tests.

- (2) "The Secretary's regulation which prohibits age, maturity or similar statements or representations with respect to neutral spirits or alcohol as misleading to the consumer obviously is reasonably adopted to the aims of the statute." (Defendants Points & Authorities, p. 8)

Plaintiff contends that the aim of the statute in its own words is to "prohibit deception of the consumer." If the regulation in question is interpreted to prohibit plaintiff's proposed label, then it is not adopted to this aim, for the plaintiff is prohibited from making a truthful, material statement concerning the quality of its neutral spirits and thus forced to mislead the consumer.

- (3) "[I]t may reasonably be presumed that . . . neutral spirits . . . because of their high proof of distillation and neutral character . . . would, unlike whiskey, brandy and rum, improve little, if any,

through storage in oak containers." (Defendants Points & Authorities, p. 10)

Once again plaintiff controverts that neutral spirits are actually neutral in character, and plaintiff contends that no qualified chemist would support this factual assertion of defendants. Furthermore, plaintiff asserts that neutral spirits change to a marked degree during storage in oak containers, which can be demonstrated both by chemical and organoleptic (taste and smell) tests. These changes impart to the stored neutral spirits a different color and a greatly improved taste and aroma.

- (4) "[T]hat if age, maturity or similar statements or representations were made as to neutral spirits, the buyer . . . might well conclude that such neutral spirits had undergone maturity changes similar to those occurring in rum, brandy and whiskey . . . and that, therefore, such statements or representations, *irrespective of falsity*, would be likely to mislead the consumer." (Emphasis added, Defendants Points & Authorities, p. 10)

The above factual contention contains a non sequitur. If neutral spirits do undergo maturity changes similar to those occurring in whiskey, which the plaintiff factually contends they do and the defendants seem to concede by the underlined portion of the above statement, then how can a truthful statement of this change be "likely to mislead the consumer"? If the defendants imply that the storage of neutral spirits does not produce such a change, then as set forth previously the plaintiff will factually demonstrate that such a contention is false.

- (5) Defendants' claim that they have filed a "Certified Administrative Record" in this proceeding. (Defendants Points & Authorities, p. 12)

Plaintiff denies that the certified administrative record of any one proceeding has been filed in this

case. The record of the administrative action of which plaintiff complains consists of two pieces of paper; namely, the application for a label approval and the denial thereof.

- (6) Defendants state that "plaintiff raises no issue with respect to the hearing procedures followed in the original adoption of the regulation in 1936." (Defendants Points & Authorities, n. 9)

Plaintiff does not question the formal hearing procedures followed in the adoption of the original regulation in 1936, but plaintiff does question the statutory authority of the Secretary to promulgate the regulation. The statute imposed on the Secretary a duty to conduct a hearing and to adopt regulations to prevent practices that he "*finds* to be likely to mislead the consumer." Significantly, absent in the attachments to the defendants' motion is any transcript of the 1935 hearings. This absence is not surprising in view of the fact that not one scintilla of evidence was introduced upon which the Secretary could make any such factual finding with regard to the regulation in question.

- (7) Neutral spirits "are types of distilled spirits whose quality does not improve with aging and the ruling in question was predicated upon the ground that, being meaningless, representations of age for those distilled spirits would be misleading to the consuming public." (Defendants Points & Authorities, pp. 13-14)

Plaintiff as pointed out above vigorously disputes this factual assertion and will demonstrate that neutral spirits do improve during storage in used oak cooperage for a period of not less than four years.

- (8) "[N]o useful knowledge would be communicated to the purchaser by . . . allowing indirect reference to

the age of neutral spirits." (Defendants Points & Authorities, p. 15)

Plaintiff on the other hand contends that a very useful purpose would be served by allowing it to fully disclose to the consumer the fact that the neutral spirits in its Calvert Extra have been stored in used oak cooperage for four or more years. This contention is based upon the chemically and organoleptically demonstrated fact that such storage results in a markedly improved grain neutral spirit. Any prohibition denying the consumer this information would be likely to mislead the consumer, contrary to the statutory purpose of the Federal Alcohol Administration Act.

- (9) "[N]eutral spirits do not improve with age. . . [A]ging of neutral spirits does not constitute aging in the same sense as the aging of whiskey." (Defendants Points & Authorities, p. 16)

Once again the plaintiff controverts the same facts which the defendants continually allude to. Plaintiff asserts that neutral spirits do improve with storage for four or more years in used cooperage, and that during such storage the neutral spirits mature in the same sense as during the storage of whiskey.

- (10) "[N]o conclusive data is available that such products [neutral spirits] do age, or that they improve with storage in oak containers." (Defendants Points & Authorities, p. 18)

Although defendants seem to have weakened their factual contention by stating that "no conclusive data is available" concerning the storage of neutral spirits in oak containers, plaintiff contends that such conclusive data is available and that it demonstrates beyond question that the storage of neutral spirits in oak containers produces a de-

85 A

cidedly improved distilled spirit, which can be demonstrated by both chemical and organoleptic tests.

Respectfully submitted,

HOGAN & HARTSON

EDMUND L. JONES

C. FRANK REIFSNYDER

JOHN J. ROSS
800 Colorado Building
Washington, D. C. 20005

WHITE & CASE

ORISON S. MARDEN

WILLIAM D. CONWELL
14 Wall Street
New York, New York

* * * *

[Filed December 6, 1963]

* * * *

DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S
AFFIDAVITS AND ATTACHED EXHIBITS A-H

Come now the defendants by their attorney, the United States Attorney for the District of Columbia, and respectfully move the Court for an order striking the affidavits of Edgar A. Bronfman, Frederick W. Klayer, and Stuart L. Adams, and the attached plaintiff's exhibits A-H, which plaintiff has now filed as attachments to its memorandum of points and authorities in opposition to defendants' and intervenors' motions to dismiss and alternative motions for summary judgment.

As grounds therefor, defendants aver:

1. Plaintiff is submitting this new material entirely *dehors* the certified administrative records. And this is being done in connection with what clearly appears to be a collateral attack upon the legislative-type labeling regulations the Administrators of the Federal Alcohol Administration Act promulgated pursuant to the authority that Act expressly confers on them to issue such regulations.

2. The legislative-type labeling regulations collaterally attacked here were issued in 1936—some 28 years ago. They were issued by the Administrators only after holding a legislative-type hearing, such as is prescribed by the Act. At that hearing all interested parties—including plaintiff—were afforded full opportunity to participate in the Administrators' rule-making process through the submission to the Administrators of whatever written data, views, arguments, etc., they desired to have the Adminis-

trators consider before issuing the regulations. Twice thereafter, in 1948 and again in 1956, the Administrators held such legislative-type hearings, to consider whether the labeling regulations should be amended so as to permit the very kind of statements as to storage in oak containers, to appear on distilled spirits bottle labels, which plaintiff here seeks to have the Administrators compelled to permit by court order. At such legislative-type hearings, all interested parties—including plaintiff—were afforded full opportunity to participate in the Administrators' rule-making process through the submission to the Administrators of whatever written data, views, arguments, etc., they desired to have the Administrators consider.

3. All the pertinent certified administrative records of those legislative-type hearings have been placed before this Court as exhibits incorporated into defendants' motion for summary judgment. Those records fully advise this Court "of the considerations which caused the administrative agency" originally to issue the challenged regulations in 1936, and then in 1948 and again in 1956 to determine that no change should be made in them. (See *Continental Distilling Corp. v. Humphrey*, 101 U.S. App. D.C. 210, 212, 247 F.2d 796, 798 (1957) (fn.2).)

4. Plaintiff has no basis whatsoever to—and in fact does not—advance any claim here that it did not have full opportunity to present to the Administrators the very written data, views, arguments, etc., it seeks to present *dehors* the administrative record to this Court by means of the affidavits and attached exhibits it proffers to this Court. Plaintiff failed to submit so much of such material as it had available for consideration by the Administrators at the legislative-type hearings held to consider changing the outstanding regulations. And it also failed to submit so much of such material as it acquired there-

after for consideration by the Administrators. No record appears as to any petition for amendment to the outstanding regulations, which plaintiff could have submitted under Section 4(d) of the Administrative Procedure Act, 5 U.S.C. 1003(d). (See affidavit marked Government Exhibit "A", attached hereto and incorporated herein.) And no reason appears why plaintiff utterly failed to follow proper administrative procedure and exhaust its administrative remedies before burdening this Court with this matter.

5. Under these circumstances, it would be error for this Court to receive and consider such affidavits and attached exhibits as plaintiff proffers here *dehors* the certified administrative records of the legislative-type hearings held in this matter by the Administrators pursuant to statute. And it would violate the settled doctrine of exhaustion of administrative remedies if the Court were to receive and consider such affidavits and attached exhibits which plaintiff should have submitted—but failed to submit—to the Administrators for their consideration.

In further support of this motion to strike, defendants refer the Court to the arguments made and authorities cited in their memorandum of points and authorities in support of motion to quash and other protective order; their further memorandum of points and authorities in reply to plaintiff's opposition to motion to quash or for other protective order; and their memorandum of points and authorities in reply to plaintiff's opposition to defendants' and intervenors' motions to dismiss and alternative

89 A

motions for summary judgment, which accompanies this motion.

/s/ David C. Acheson
DAVID C. ACHESON
United States Attorney

/s/ Charles T. Duncan
CHARLES T. DUNCAN,
Principal Assistant
United States Attorney

/s/ Joseph M. Hannon
JOSEPH M. HANNON
Assistant United States
Attorney

/s/ Gil Zimmerman
GIL ZIMMERMAN
Assistant United States
Attorney

* * * *

[Filed December 26, 1963, Harry M. Hull, Clerk]

* * * *

MEMORANDUM

This is a proceeding to review administrative action taken by the Secretary of the Treasury and his representatives under the Federal Alcohol Administration Act and Regulations promulgated under the authority of that Act.

In substance, the plaintiff contends that the regulation as applied to it is arbitrary and capricious; that the regulation itself is arbitrary and capricious; and that the regulation was improperly interpreted by the defendants in ruling that it would apply to the label proposed to be used by the plaintiff.

Considering these contentions in reverse order, the Court is of the opinion that the proposed label does violate the regulation in question; that the regulation is not arbitrary and capricious but was validly adopted under the authority of the Federal Alcohol Administration Act; and plaintiff's contention that the regulation is being arbitrarily and capriciously applied to plaintiff is without merit as a matter of law.

The Court being of the opinion that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law, the motions for summary judgment will be granted. Also the defendants' motion to strike plaintiff's affidavits and attached exhibits will be granted.

Counsel for defendants will submit an order in conformity with this memorandum.

/s/ Joseph C. McGarraghy
Judge

December 20, 1963

[Filed January 2, 1964]

* * * *

JUDGMENT

This cause having come before the Court on defendants' and intervenors' motions to dismiss and alternative motions for summary judgment; plaintiff's opposition thereto; defendants' motion to strike plaintiff's affidavits and attached exhibits; and plaintiff's opposition thereto; counsel having been heard; the Court having considered the record and the memoranda filed by the parties; and the Court being fully advised in the premises and having entered a memorandum opinion in the case on December 20, 1963,

It is this 2d day of January, 1964,

ORDERED, ADJUDGED AND DECREED:

- (1) That defendants' and intervenors' motions for summary judgment be, and the same hereby are, granted;
- (2) That defendants' motion to strike plaintiff's affidavits and attached exhibits be, and the same hereby is, granted;
- (3) That all other pending matters in the case are moot; and
- (4) That the action be, and the same hereby is, dismissed.

/s/ J. McGarraghy
United States District Judge

* * * *

[Filed January 17, 1964]

* * * *

NOTICE OF APPEAL

Notice is hereby given this 17th day of January, 1964 that plaintiff, Joseph E. Seagram & Sons, Inc., hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the judgment of this Court entered on the 2nd day of January, 1964 granting the defendants' and intervenors' motions for summary judgment; granting the defendants' motion to strike plaintiff's affidavits and attached exhibits; declaring all other pending matters in the case to be moot; and dismissing the action.

HOGAN & HARTSON

By /s/ Edmund L. Jones
EDMUND L. JONES
Attorney for the Plaintiff
Joseph E. Seagram & Sons,
Inc.



VOLUME II
JOINT APPENDIX

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,465

JOSEPH E. SEAGRAM & SONS, INC.
Plaintiff/Appellant,

v.

HONORABLE DOUGLAS DILLON, ET AL.,
Defendant/Appellees,

AND

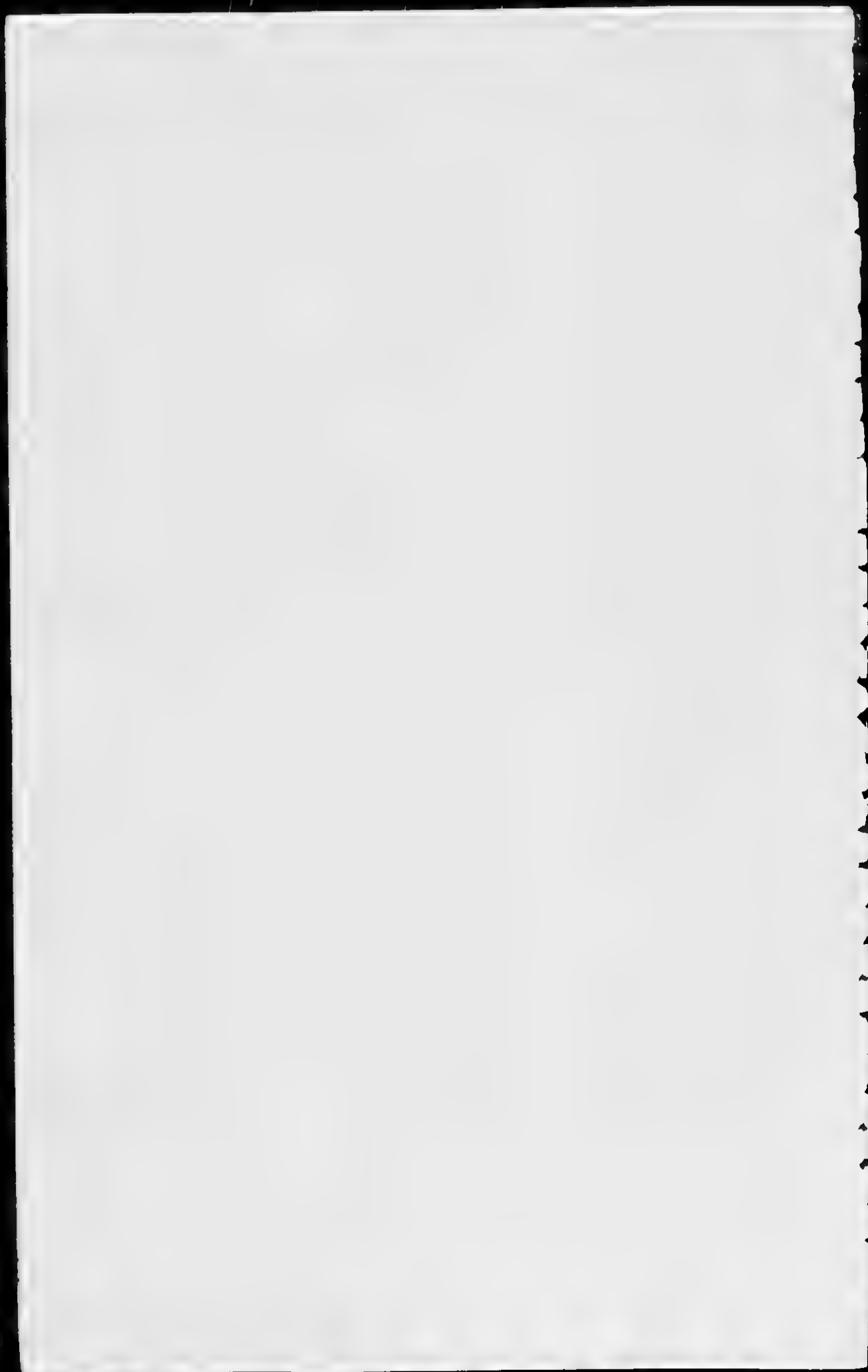
NATIONAL DISTILLERS AND CHEMICAL
CORPORATION, ET AL.,
Intervenor Defendants/Appellees

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 8 1964

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CLERK



INDEX TO VOLUME II

Page

APPELLEES' SUPPLEMENTARY APPENDIX

- I. Material from the District Court proceedings not included in appellant's designation of record:
 - A. Government defendants' statement of the material facts, adopted in support of Government defendants' motion to dismiss and alternative motion for summary judgment.. 93A
 - B. Affidavit of R. R. Herrmann, Jr., filed by Intervenor, in support of their motion for leave to intervene as defendants, together with Item No. 1 attached thereto..... 98A
 - C. Order of District Court granting Intervenor's motion to intervene..... 103A
 - D. Government defendants' motion to quash and for other protective order..... 104A
 - E. Plaintiff's notice of motion for hearing on Government defendants' motion to quash, etc..... 107A
 - F. Order of District Court staying taking of depositions..... 108A
 - G. Affidavit of Dwight E. Avis, attached as Government Exhibit No. "A" to Government defendants' motion to strike, etc..... 109A
- II. Relating material from the certified administrative records of the Alcohol and Tobacco Tax Division, Internal Revenue Service, United States Treasury Department, not included in appellant's designation of record:
 - H. Government Exhibit 1. Plaintiff's application (dated December 26, 1962) for label approval, and denial thereof by the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, U.S. Treasury Department..... 112A

- I. Government Exhibit 4. Plaintiff's application (dated February 8, 1963) for label approval, and certificate of label approval (dated February 11, 1963)..... 116A
- J. Government Exhibit 5. Pertinent excerpts from Federal Alcohol Control Administration Regulations relating to the labeling of distilled spirits (dated August 10, 1934).... 120A
- K. Government Exhibit 10. Pertinent excerpts from transcript of hearing held pursuant to statute by the United States Treasury Department, Alcohol Tax Unit, Bureau of Internal Revenue on October 25, 1948 at Washington, D.C.—
- In the matter of:
- Proposals to amend Regulations No. 5 (27 CFR Part 5) Relating to Labeling and Advertising of Distilled Spirits, etc..... 125A
- L. Government Exhibit 11. Pertinent excerpts from transcript of hearing held pursuant to statute on November 28, 1956 at Room 3313, Internal Revenue Building, Washington, D.C., by the Treasury Department, Internal Revenue Service, Alcohol and Tobacco Tax Division, in re:
- Proposal to Amend Regulations No. 5 (27 CFR Part 4) Relating to Labeling and Advertising of Distilled Spirits..... 138A
- M. Government Exhibit 12. Pertinent excerpts from transcript of hearing held pursuant to statute on December 5, 1956 at San Francisco, California, by Treasury Department, Internal Revenue Service, Alcohol and Tobacco Tax Division, in re:
- Proposal to Amend Regulations No. 5 (27 CFR Part 5) Relating to Labeling and Advertising of Distilled Spirits..... 166A

	Page
N. Government Exhibit 13. Memorandum dated January 10, 1957 submitted by League of Distilled Spirits Rectifiers, Inc., Washington, D. C. to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, on behalf of the League's members, in opposition to Proposals 24 and 30 in Notice of Hearing on proposed amendments to Regulations 5 (27 CFR Part 5) relating to labeling and advertising of distilled spirits..	174A
O. Government Exhibit 14. Brief of the Distillers Company, Ltd., filed January 4, 1957 with the Director, Alcohol and Tobacco Tax Division, Department of the Treasury Internal Revenue Service, In the Matter of Proposals to Amend Regulations No. 5 Relating to the Labeling and Advertising of Distilled Spirits, Hearings held November 28 and December 5, 1956.....	180A
P. Government Exhibit No. 15. Letter dated December 4, 1956, submitted by the National Distillers Products Corporation to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, in re the public hearings held on certain proposals to amend the FAA regulations, as set out in the notice of hearings.....	197A
Q. Government Exhibit 16. Telegram sent by the Fleischman Distilling Corporation dated December 4, 1963, to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, in opposition to Proposals 24 and 30 concerning labeling and advertising of certain products such as neutral spirits and gin.....	200A

R. Government Exhibit 17.

- (A) Night letter telegram sent by the Barton Distilling Company dated December 4, 1963, to the Alcohol and Tobacco Tax Division, in re the Hearing on Proposals to Amend Regulations No. 5 (27 CFR Part 5)..... 201A
- (B) Follow-up letter (with enclosures) sent by the Barton Distilling Company, dated December 4, 1956, to the Alcohol and Tobacco Tax Division, in re Hearing on Proposals to Amend Regulations No. 5 (27 CFR Part 5)..... 203A

VOLUME II

APPELLEES' SUPPLEMENTARY APPENDIX

**I. Material from the District Court Proceedings Not
Included in Appellant's Designation of Record**



A. Government Defendants' Statement of the Material Facts, Adopted in Support of Government Defendants' Motion to Dismiss and Alternative Motion for Summary Judgment, Filed May 23, 1963

This suit seeks judicial review of administrative action taken by the Secretary of the Treasury under the Federal Alcohol Administration Act and regulations promulgated thereunder.¹ It essentially involves an attack by the plaintiff corporation on a regulation issued by the Secretary pursuant to specific statutory authority.

(A). The Case.

Plaintiff corporation is engaged in the business of distilling, blending, bottling, etc. of whisky and other distilled spirits. It challenges here the action of Defendant Avis, the delegate of the Secretary of the Treasury, in denying approval of labels plaintiff submitted for "Calvert Extra" blended whisky. This denial in substance rejected certain wording plaintiff proposed to have included on the back of the bottle label because it is deemed to be an age, maturity, or similar statement or representation as to neutral spirits, barred as misleading by a section of the labeling regulations, 27 C.F.R. 5.39(d). The following is the rejected wording:

Calvert Extra was begun years ago when these [grain neutral] spirits * * * were put aside. The grain neutral spirits in this product contribute a unique, delightful taste of their own, the result of a special distillation process and of storage for at least four years in specially selected used cooperage

¹ The statute is 49 Stat. 977, *et seq.*, as amended, 27 U.S.C. 201, *et seq.* It is hereinafter referred to as "the Act." The regulations appear in Title 27, C.F.R. (Rev. ed., 1961), entitled "Intoxicating Liquors." The administrative action challenged here was taken by the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, as the delegate of the Secretary of the Treasury.

—barrels which were previously used for aging our fine whiskies.

[Bracketed material supplied.]

(B). *The Act.*

Section 5(e) of the Act (27 U.S.C. 205(e)) specifically authorizes the Secretary of the Treasury to prescribe regulations governing the labeling of bottles of distilled spirits for introduction into, or receipt in, interstate or foreign commerce. Among the legislative standards prescribed by the Congress for such regulations are provisions that the regulations be such "(1) as will *prohibit deception of the consumer with respect to such products * * ** and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, * * * as the Secretary of the Treasury finds to be likely to mislead the consumer; (2) as will provide the consumer with adequate information as to the identity and quality of the products * * *; (3) as will require an accurate statement, in the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification, informing the consumer of the percentage of neutral spirits so used and of the name of the commodity from which such neutral spirits have been distilled * * *", among other things. [Emphasis supplied.]

(C.) *The Regulations.*

Regulations No. 5 Relating to Labeling and Advertising of Distilled Spirits (now codified as 27 C.F.R. Part 5), issued pursuant to section 5(e) of the Act, were approved by the Secretary on January 18, 1936, after due notice and hearing.

In Subpart C of the regulations are found the standards of identity for the various classes and types of distilled spirits, to which products labeled with these designations must conform. Section 5.21(a) defines the term "neutral spirits" or "alcohol" as "distilled spirits distilled from

any material at or above 190° proof,² whether or not such proof is subsequently reduced." Section 5.21(b) defines "whiskey" as being distilled from grain at less than 190° proof "in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to whiskey." Section 5.21(b)(7) defines "blended whiskey" as a mixture of at least 20 percent by volume of 100° proof straight whiskey³ and other whiskey or neutral spirits.

The particular provision of these regulations, 27 C.F.R. 5.39(d),⁴ which plaintiff challenges, is found in Subpart D. It reads as follows:

Age, maturity, or similar statements or representations as to neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs, bitters, and specialties are misleading and are prohibited from being stated on any label.

[Emphasis supplied.]

In addition, section 5.30(e)(5) contains the following statement, not referred to in plaintiff's complaint, which is also pertinent to this litigation, since it is essentially to the same effect as section 5.30(d):

Age, maturity or similar representations as to neutral spirits, gin, liqueurs, cordials, vodka, cocktails,

² "Proof" is alcoholic content. The percentage of ethyl alcohol in distilled spirits is stated at twice the percentage of such alcohol by volume at a temperature of 60°F. For example, 95% alcohol would be 190° proof; whiskey with 50% alcohol is 100° proof whiskey.

³ "Straight whiskey" is defined as whiskey distilled from grain at not exceeding 160° proof, and aged, generally, for not less than 24 calendar months.

⁴ Paragraph 2 of Treasury Decision 6288 published in the issue of the Federal Register for April 3, 1958, 23 F.R. 2180, provided for the deletion of subparagraph (c) of section 5.39, effective April 3, 1961, and the relettering of subparagraph (d) as (c). However, apparently through oversight, this change has not been reflected in the Code of Federal Regulations.

gin fizzes, highballs, and bitters, *are misleading*, and shall not appear upon any label, except that the use of the word 'old' or other word denoting age, appearing as part of the brand name, shall not be deemed to be an age representation in the case of such distilled spirits, * * *.

[Emphasis supplied.]

On August 25, 1948, there was published in the Federal Register (13 F.R. 4927)⁵ a notice of a public hearing to be held on October 25, 1948, to consider various proposals to amend the regulations relating to labeling and advertising of distilled spirits (27 C.F.R., Part 5). Among the proposals included in that notice was the following:

10. To amend sections 39(d) and (e) (27 C.F.R. 5.39(d) and (e)), 64 (c) (27 C.F.R. 64(c)) and other pertinent sections of the regulations so as to except from the prohibition against statements and representations relating to age in the case of neutral spirits, general and inconspicuous references of an informative nature, on back labels or in advertisements, to production methods involving "mellowing", "softening", "velveting", or "smoothing" neutral spirits through storage in oak cooperage for a period of not less than 6 months.

This proposal to amend the regulations was not adopted.

Some eight years later, on October 31, 1956, there was published in the Federal Register (21 F.R. 8321) a notice of a public hearing to be held on November 28 and December 5, 1956, to consider various proposals to amend the regulations relating to labeling and advertising of distilled spirits (27 C.F.R., Part 5). Among the proposals included in that notice were the following:

⁵ " * * * The contents of the Federal Register shall be judicially noticed * * *". 44 U.S.C. 307.

24. To amend section 39(e)(5) (27 CFR 5.39(e)(5)) to permit truthful references of a general and informative nature relating to methods of production involving storage as to certain products, such as neutral spirits and gin, which are not entitled to bear age statements, provided they have been stored in oak containers for some specified minimum period, *e.g.*, three months.

30. To amend section 64(c) (27 CFR 5.64(c)) to permit truthful references of a general and informative nature relating to methods of production involving storage in advertisements for certain products, such as neutral spirits and gin, which are not entitled to bear age statements, provided they have been stored in oak containers for some specified minimum period, *e.g.*, three months.

Those proposals to amend the regulations were likewise not adopted.

Section 5.38(d) and section 5.39(e)(5) still appear in the present regulations in the same form as they were originally published in the Federal Register on April 2, 1936 (1 F.R. 92, 97, 98).

**B. Affidavit of R. R. Hermann, Jr., Filed by Intervenor,
in Support of Their Motion for Leave to Intervene as
Defendants, Together with Item No. 1 Attached Thereto,
on May 27, 1963**

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

I, R. R. Herrmann, Jr., being first duly sworn on oath,
do depose and say that:

1. I am a Vice President of National Distillers and Chemical Corporation, 99 Park Avenue, New York 16, New York, an Applicant for Intervention in the above-captioned proceeding. I am also Assistant General Sales Manager of National Distillers Products Company, Applicant's Liquor Division.

2. I have reviewed certain magazine advertisements, press releases and newspaper articles relating to "Calvert Extra," the product described in Paragraph 9 of the Complaint in the above-captioned proceeding, and attach hereto as Items 1 through 13, the following described matters:

- Item 1 — Article from *Printer's Ink* of March 29, 1963.
- Item 2 — Advertisement to appear in consumer magazines in May of 1963.
- Item 3 — Eight-page article from *Beverage Media*, April, 1963.
- Item 4 — Copy of a Press Release for Calvert Distillers Company.
- Item 5 — Excerpt from *Beverage Retailer Weekly*, February 11, 1963.
- Item 6 — Article from *New York Standard*, March 3, 1963.

- Item 7 — Excerpt from the *Spirit of '375'*, February, 1963.
- Item 8 — Article from *Advertising Age*, March 4, 1963.
- Item 9 — Article from *New York Independent*, March 3, 1963.
- Item 10 — Article from *Los Angeles Times*, March 1, 1963.
- Item 11 — Copy of Press Release for Joseph E. Seagram & Sons, Inc.
- Item 12 — *Ed Gibbs Newsletter*, March 22, 1963.
- Item 13 — Article from *Glamour Magazine*, May, 1963.

3. The above listed items show that plaintiff is going to institute a "massive promotion" campaign (Items 1, 3, 7, 8 and 10); that it will expend \$2,500,000. in the first ninety (90) days of its advertising campaign for the promotion of "Calvert Extra" (Items 1, 3, 4, 8 and 12); that its advertising will be predicated in large part on a claim that it is using aged neutral spirits in its blended whiskey (Items 1, 3, 5, 8, 9, 10 and 11); that its salesmen are stressing this age claim to retail and wholesale dealers (Item 2 and 8); that plaintiff planned its "Calvert Extra" more than five years ago, when it commenced storing neutral spirits in used cooperage (Item 3); and that, for this reason, plaintiff has at least a five year jump on the rest of the distilling industry (Items 1, 3 and 12).

4. The ability of a distiller to make any age claim, direct or indirect, concerning neutral spirits on the label of its products, in its advertising or in any other sales message is a most important claim which will influence the purchase of whiskey by consumers.

5. The institution of this massive promotion by plaintiff, predicated in large measure upon age claims for

neutral spirits, will have an immediate, direct and adverse economic impact on the sale of all whiskey by other distillers, including the Applicants for Intervention herein.

6. From Applicant's analysis of United States Government reports it is believed that there are now approximately 62 million gallons of spirits of less than 190 proof in storage in the United States in used cooperage over 1 year and up to 10 years of age. It is estimated that plaintiff herein owns approximately 59 million gallons or 95% of such inventory. Of this 59 million gallons, it is estimated that approximately 52.5 million gallons are 2 or more years of age, and approximately 6.5 million gallons are 5 or more years old.

7. If Regulation 5.39(c) is found to be invalid, plaintiff will, as claimed in the referenced items, have at least a five year lead over the rest of the industry, and the Applicants for Intervention will not only suffer irreparable harm and damage, but they will have to change their production methods to obtain the benefits of the Court's decree.

8. Applicants, as a result of research, study and technical investigations, have a complete and full understanding of the effects on neutral spirits resulting from their storage in reused cooperage, and believe they can demonstrate in this proceeding, with a competency unequaled by others, the full nature of such effects. The research, study, and investigation referred to includes chemical, organoleptic (sight, smell and taste) and other pertinent data relating to spirits stored in reused cooperage for various lengths of time, including the period claimed by plaintiff.

/s/ R. R. Herrmann, Jr.
R. R. HERRMANN, JR.

101 A

VERIFICATION

I, R. R. Herrmann, Jr., hereby certify that the above statements made by me are true, and as to those matters which are stated upon information and belief, I verily believe them to be true.

/s/ R. R. Herrmann, Jr.
R. R. HERRMANN, JR.

Subscribed and sworn to before me this 26th day of April, 1963.

/s/ Gladys C. Donovan
Notary Public



Will Calvert's "soft" whiskey uncover a new taste market?

102 A

During a sultry week in August 1962, New Yorkers strolling along Park Avenue were lured into the Waldorf-Astoria for an exercise in sipping scotches.

Amid impressive clinical trappings, participants were asked to taste three different brands and give their reactions. The test, as it developed, was being conducted by the House of Seagram—to find out about the popularity of "light" spirits. Some mystery surrounded the survey at the time, but the answer came this week: Calvert Distillers Co., in the Seagram stable, launched new Calvert Extra, a "soft" whiskey, in New York State, New Jersey and Connecticut. The new brand has been offered on the west coast for some weeks.

Calvert calls its Calvert Extra, an 86-proof blend of 50 whiskeys and aged grain neutral spirits, a "new beverage concept." Further, says the company, this new whiskey is "this country's answer to the rapid growth of foreign imports." Going further, Edgar M. Bronfman, Calvert president, says that aged spirits, used for the first time in American whiskey, have taken the hardness out of hard liquor. Calvert Extra, he contends, gives a clean, delicate, soft taste lasting to the final sip of the highball. Also, 22,000 experiments were tried by Calvert blenders over a period of years before the final blend was decided upon.

Whether this is overstating the case or not (and some hyperbole is understandable), the appearance of the new brand sets up an interesting situation in this fiercely competitive field.

What's really behind the "soft" whiskey move? Calvert, like all spirits makers, has long been sharply aware of the rising sales of vodka and the mounting popularity of "light" scotch. Calvert Extra is a determined effort to cash in on what the company believes is a definite swing in drinking tastes.

Calvert is brashly confident that the swing to "softness" is here to stay. Dramatic evidence of this is shown in the company's decision to withdraw its Calvert Reserve from the market, and replace it with Calvert Extra. The price will be about the same in most areas. Calvert Reserve sold 1,500,000 cases last year, which added up to about \$50-million. The brand has been, to be sure, declining in sales from past years. But even so, it is still the sixth top brand in the country and pulling it off the market is an impressive

Introducing Soft Whiskey



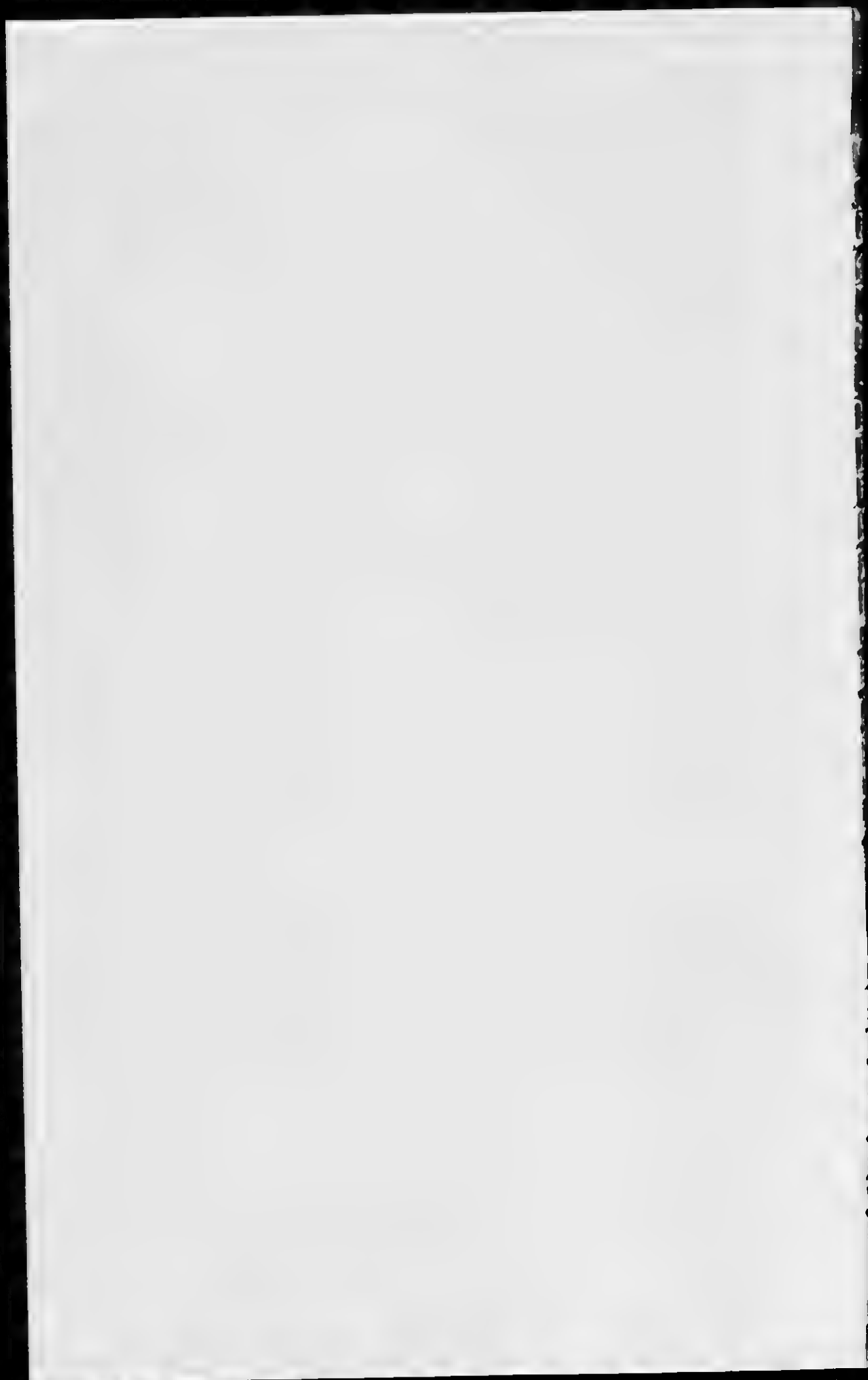
Ads for Calvert Extra, the "soft" whiskey, break in May via Doyle Dane Bernbach

move. Just how impressive is indicated by noting the sales of other well-known brands: for example, Buckingham Corp's Cutty Sark, the nation's top-selling scotch, hit 1,200,000 cases last year; Paddington Corp's "light" scotch, J & B, sold about 800,000 cases and led in New York among scotches.

Calvert, in any case, is going all the way with its "Extra." Rival companies, of course, could be considering a "soft" whiskey—for the same reasons. But the company says it has at least a five-year lead here, because of the specialized aging and distilling process of the "Ex'ra."

The company is currently engaged in a suit against the Alcohol and Tobacco Tax Division of the Treasury Department in order better to describe the contents of the brand. So far ATTD insists on the standard labelling reference of spirits stored in wood.

The brand—in a bottle selected as a result of Politz research—is now being stocked by retailers, and national distribution will be completed by May. At that time, through Doyle Dane Bernbach (Calvert Reserve agency), an impressive campaign will break in magazines, newspapers and outdoor. More than \$2,500,000 is allocated for the three-month introductory push. The whole industry will be watching to see if the "soft" touch proves to be the right one.



C. *Order of District Court Granting Intervenors' Motion to Intervene, Entered October 16, 1963*

Upon consideration of the Motion for Leave to Intervene as defendants filed herein by National Distillers and Chemical Corporation, Schenley Industries, Inc., and Stitzel-Weller Distillery, Inc., the opposition of the plaintiff thereto and the full argument of the parties in open Court and it appearing to the Court that said Motion should be granted under Rules 24(a)(2) and 24(b) of the Federal Rules of Civil Procedure, it is by the Court this 16th day of October, 1963,

ORDERED that National Distillers and Chemical Corporation, Schenley Industries, Inc., and Stitzel-Weller Distillery, Inc. be and they are hereby granted leave to intervene as parties defendant herein.

/s/ Joseph C. McGarraghy
Judge

D. Government Defendants' Motion to Quash and for Other Protective Order, Filed October 16, 1963

Come now the Government defendants by their attorney, the United States Attorney for the District of Columbia, and respectfully move the Court for a protective order under Rule 30 (b), F.R.C.P., as hereinafter follows:

Defendants pray that such order quash the subpoena and notice of taking of deposition served by plaintiff upon Dr. Alex P. Mathers, Chief, National Office Laboratory, Alcohol and Tobacco Tax Division, Internal Revenue Service, calling for him to depose in this cause on October 17, 1963. Alternatively, defendants pray that such order stay the taking of Dr. Mathers' deposition, and the effectiveness of the subpoena served upon him, and any other discovery procedure to which plaintiff may resort in relation to defendants or any of their subordinates, pending further order of this Court, following upon the Court's disposition of defendants' pending motion to dismiss and alternative motion for summary judgment.

Defendants further pray that the Court order a temporary stay as to any discovery pending its determination of the present motion for protective order.

In support of this motion, defendants aver:

1. Defendants verily believe that their motion to dismiss and alternative motion for summary judgment are well founded, and that this Court will dismiss this action upon the hearing of the said motions.

2. This case involves solely questions of law. Plaintiff challenges only administrative action taken under a published regulation, and claims that, if the regulation has been properly applied in its case, the regulation is invalid.

3. The regulation in question was issued pursuant to statutory authority vested in the Secretary of the Treas-

ury. As required by the statute, public notice was duly given, and a quasi-legislative hearing conducted, before the regulation was promulgated. The continued existence of the regulation was made the subject of like quasi-legislative hearings on two subsequent occasions, at which representatives of the plaintiff, as well as others in the Distilled Spirits Industry, were given full opportunity to present their views. And the determination was reached by the delegate of the Secretary of the Treasury, in consideration of all the representations made at such quasi-legislative hearings, that the regulation should remain in full force and effect.

4. This case involves *solely* judicial review of the aforesaid Agency action; the pertinent Agency records—relating both to the challenged administrative action taken upon plaintiff's application, and the conduct of the quasi-legislative hearings, etc., leading to promulgation and retention in force of the challenged regulation—have been duly certified and placed before the Court for its review in this cause.

5. Plaintiff is not entitled to go beyond those administrative records in these review proceedings; and there is no warrant for this Court to conduct any hearing *de novo* in performing its proper judicial review function in this case.

6. Any consideration this Court might give to evidence taken *dehors* the administrative records in conducting its judicial review would violate the doctrine of exhaustion of administrative remedies.

7. Accordingly, no good cause exists here for discovery; and in any event discovery should await the Court's disposition of defendants' pending motion to dismiss and for summary judgment.

In further support of this motion, defendants herewith submit a memorandum of points and authorities.

/s/ David C. Acheson
DAVID C. ACHESON
United States Attorney

/s/ Charles T. Duncan
CHARLES T. DUNCAN, *Principal*
Assistant United States Attorney

/s/ Joseph M. Hannon
JOSEPH M. HANNON
Assistant United States Attorney

/s/ Gil Zimmerman
GIL ZIMMERMAN
Assistant United States Attorney

E. Plaintiff's Notice of Motion for Hearing on Government Defendants' Motion to Quash, etc., Filed October 17, 1963

To: David C. Acheson, United States Attorney
Charles T. Duncan, Principal Assistant
United States Attorney

Joseph M. Hannon, Assistant United States
Attorney

Gil Zimmerman, Assistant United States
Attorney

Please take notice, that the undersigned will bring the "Government Defendants' Motion To Quash And For Other Protective Order" on for hearing as a preliminary matter before the Honorable Joseph C. McGarraghy, United States District Judge, on Thursday the 17th day of October, 1963, at 9:45 a.m. or soon thereafter as counsel can be heard.

HOGAN & HARTSON

/s/ Edmund L. Jones
EDMUND L. JONES

**F. *Order of District Court Staying Taking of Depositions,
Entered November 8, 1963***

This cause came on to be heard upon the defendants' and intervenors' motions to quash and for other protective order, and upon consideration of said motions, and the memoranda of points and authorities filed in support thereof and in opposition thereto, and the argument of counsel, it is by the Court this 8th day of November, 1963,

ORDERED that the depositions which have been noticed by the plaintiff in this case be and the same hereby are suspended and stayed until disposition by this Court of defendants' and intervenors' pending motions to dismiss and alternative motions for summary judgment.

/s/ Joseph C. McGarraghy
Judge

**G. Affidavit of Dwight E. Avis Dated December 5, 1963,
Attached as Government Exhibit No. "A" to Government
Defendants' Motion to Strike, etc., Filed December 6,
1963**

District of Columbia)
) ss.
)

Dwight E. Avis, being first duly sworn on his oath, deposes and says:

1. I am the duly appointed Director, Alcohol and Tobacco Tax Division, Internal Revenue Service.

2. I have not received from Joseph E. Seagram & Sons, Inc., any petition under section 4(d) of the Administrative Procedure Act (5 U.S.C. 1003(d)) for amendment of 27 CFR 5.39(d) since the hearing held on this question in 1956. To the best of my knowledge and belief, no such petition has been filed with the Treasury Department.

3. As Director, Alcohol and Tobacco Tax Division, I have been delegated authority to act on applications for certificates of label approval under the Federal Alcohol Administration Act and on January 2, 1963, and on January 28, 1963, I issued notices of denial of applications for certificates of label approval filed by Joseph E. Seagram & Sons, Inc., covering the labels for "Calvert Extra" blended whisky.

4. I have at no time received a request from any representative of Joseph E. Seagram & Sons, Inc., for a hearing in connection with such notices of denial nor have I received any request for reconsideration of the issuance of the notices of denial.

110 A

Dated this 5th day of December, 1963.

/s/ Dwight E. Avis
DWIGHT E. AVIS
*Director, Alcohol and Tobacco
Tax Division*

SUBSCRIBED AND SWORN to before me
this 5th day of December, 1963.

/s/ Ruth L. Apple
Notary Public
My Commission expires June 14, 1966.

[SEAL]

II. Relating Material from the Certified Administrative Records of the Alcohol and Tobacco Tax Division, Internal Revenue Service, United States Treasury Department, Not Included in Appellant's Designation of Record

H. *Government Exhibit 1. Plaintiff's Application (Dated December 26, 1962) for Label Approval, and Denial Thereof by the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, U.S. Treasury Department*

Form 1651 (Rev. July 1958)

U. S. Treasury Department—Internal Revenue Service
**NOTICE OF DENIAL OF LABEL CERTIFICATE
 APPLICATION UNDER THE FEDERAL ALCOHOL
 ADMINISTRATION ACT**

Name and Address of Permittee

TO: JOSEPH E. SEAGRAM & SONS, INC. d/b/a
 CALVERT DISTILLING CO. Washington Boulevard,
 three miles south of Baltimore, Md. (P. O.
 Box 208)

1. Brand Name: CALVERT EXTRA; 2. Class and Type:
 Blended Whiskey; 3. Date of certificate application: December 26, 1962.

4. Your certificate application, under the labeling provisions of the Federal Alcohol Administration Act and regulations pursuant thereto, dated as shown in item 3, to cover products the containers of which bear the labels affixed to such application, and identified in items 1 and 2 above has been duly considered, and is hereby denied for the following reasons:

1. All of the wording on the back label to the effect that the grain neutral spirits in the product were put aside years ago, and that such spirits have been stored " * * * for at least four years in specially selected used cooperage—barrels which were previously used for aging fine whiskies" must be deleted to conform with the distilled spirits labeling regulations (27 CFR 5.39(d)).

This section of the regulations provides "Age, maturity, or similar statements or representations as to neutral spirits * * * are misleading and are prohibited from being stated on any label."

2. That portion of the back label which is regarded by the regulations as the "Government Label" must appear at the extreme top or bottom of the label, separated from all other wording by a wide space or heavy line. To comply with this requirement, the words "Calvert Extra" must be relocated.

5. Date:

6. Director, Alcohol and Tobacco Tax Division:

Form 1649 (Rev. 9-57) (Combines Form 1647 and Form 1649)

U. S. Treasury Department—Internal Revenue Service

LABEL APPROVAL

Under Federal Alcohol Administration Act

1. Applicant's Serial No.: (*If any*)

Section I Application

2. Name of Permittee as Shown on Basic Permit, or Name of Brewer (*Include trade name, if used on these labels*) and P.O. Address of Bottling Plant: JOSEPH E. SEAGRAM & SONS, INC. d/b/a Calvert Distilling Co. Washington Boulevard, three miles south of Baltimore, Md. (P.O. Box 208)

3. IN CASE OF IMPORTS ONLY (Permittee is)
(*Check applicable box*)

☐ IMPORTER ☐ TRANSFEREE IN BOND

4. Basic Permit No.: PHI-DRB-17

5. The above listed permittee hereby makes application for a certificate of label approval for an alcoholic beverage to be introduced in commerce in containers bearing the labels affixed hereto, and identified as: A. Brand Name: CALVERT EXTRA; B. Class and Type: BLENDED WHISKEY.

6. State any wording, except required indicia on container, not shown on labels. (*Caps, celoseals, etc.*) If optional so indicate: CONTENTS BLOWN INTO GLASS

7. Certificate to be mailed to (*Name and address*)
Frederick J. Lind, 375 Park Avenue, New York 22, N. Y.

The applicant hereby declares, under the penalties of perjury, that to the best of his knowledge and belief all statements appearing in this application, including representations on labels and in supplementary documents, are true and correct, and truly and correctly represent the contents of the containers to which such labels will be applied.

8. Date: December 26, 1962

Signature of applicant or signature and title of authorized agent: /s/ Frederick J. Lind, Vice President.

* * * *



APPROVED

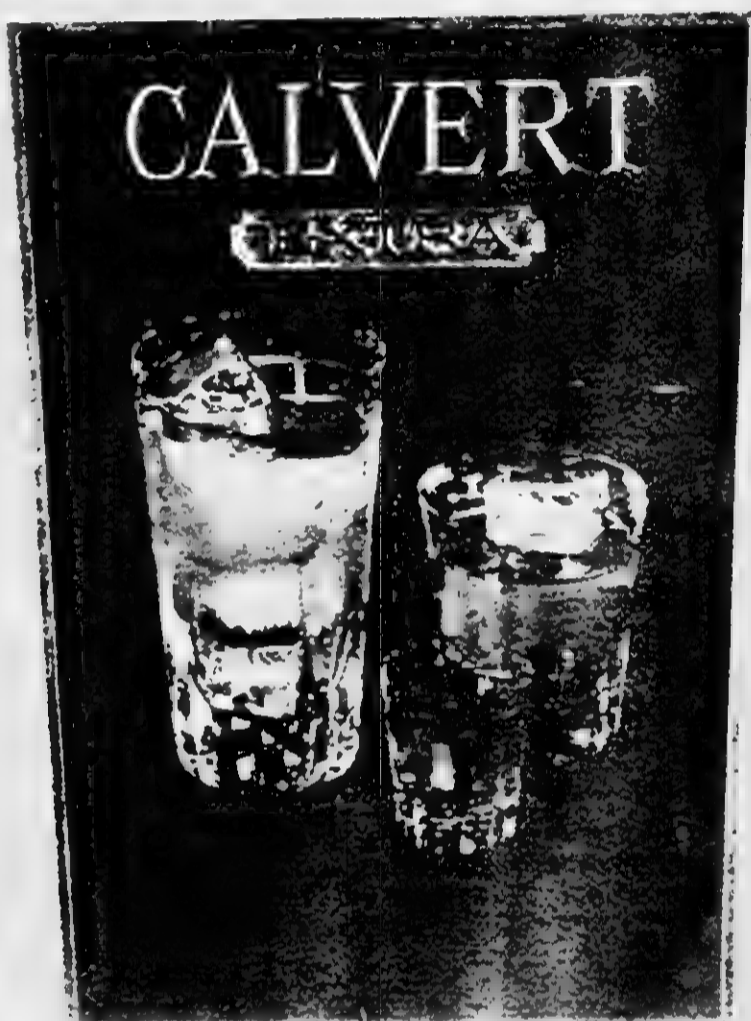
LABEL APPROVAL

APP. SERIAL NO., IF ANY

FOR USE OF INTERNAL REVENUE SERVICE ONLY

REMARKS

APPROVED



CALVERT
EXTRA

VERY OLD WHISKY

Calvert Extra was begun years ago when the
spirit and whiskey were put into the glass
neutral spirits in this product contribute a
unique, delightful taste of the purest
virtue of a special distillation process and of
the age for at least four years in specially
selected used caskage. Barrels which were
previously used for aging our fine whiskeys.
Today only Calvert has the combination of
spirit and choice straight whiskey to create
this superb blend of unique character and
unparalleled smoothness. CALVERT EXTRA

EX-111

FORM 1649 (REV. 9-57)

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I. Government Exhibit 4. Plaintiff's Application (Dated February 8, 1963) for Label Approval, and Certificate of Label Approval (Dated February 11, 1963)

Form 1649 (Rev. 9-57) (Combines Form 1647 and Form 1649)

U. S. Treasury Department—Internal Revenue Service

LABEL APPROVAL

Under Federal Alcohol Administration Act

1. Applicant's Serial No.: (If any) R-1-63

Section I Application

2. Name of Permittee as Shown on Basic Permit, or Name of Brewer (Include trade name, if used on these labels) and P.O. Address of Bottling Plant: JOSEPH E. SEAGRAM & SONS, INC. d/b/a Calvert Distilling Co. Washington Boulevard, three miles south of Baltimore, Md. (P.O. Box 208) Baltimore, Maryland.

3. IN CASE OF IMPORTS ONLY (Permittee is)
(Check applicable box)

☐ IMPORTER ☐ TRANSFEREE IN BOND

4. Basic Permit No.: PHI-DRB-17

5. The above listed permittee hereby makes application for a certificate of label approval for an alcoholic beverage to be introduced in commerce in containers bearing the labels affixed hereto, and identified as: A. Brand Name: CALVERT EXTRA; B. Class and Type: BLENDED WHISKEY.

6. State any wording, except required indicia on container, not shown on labels. (Caps, celloseals, etc.) If optional so indicate: NET CONTENTS BLOWN IN BOTTLE

7. Certificate to be mailed to (*Name and address*)
 N. Cheper, Joseph E. Seagram & Sons, Inc., 375 Park
 Ave., New York 22, New York & A. Theriault, Joseph E.
 Seagram & Sons, Inc., P.O. Box 208, Baltimore 3, Mary-
 land

The applicant hereby declares, under the penalties of
 perjury, that to the best of his knowledge and belief all
 statements appearing in this application, including repre-
 sentations on labels and in supplementary documents, are
 true and correct, and truly and correctly represent the
 contents of the containers to which such labels will be
 applied.

8. Date: February 8, 1963

Signature of applicant or signature and title of author-
 ized agent: JOSEPH E. SEAGRAM & SONS, INC.,
 d/b/a Calvert Distilling Co., /s/ N. Cheper, N. CHEPER,
 Attorney-in-Fact.

* * * *

Section II Certificate of Label Approval

Certificate of label approval is hereby issued, subject to
 the conditions and qualifications, if any, stated on the re-
 verse hereof, to cover products the containers of which
 bear a set of labels identical with set affixed to the re-
 verse side hereof, and in addition, to cover products the
 containers of which bear labels which differ from those
 affixed hereto only, and in no other respect, than by rea-
 son of (a) a change in the proportionate size of the
 labels, (b) a change in the net content statement, (c)
 as to imported products, a change in the name of the
 responsible importer, (d) as to distilled spirits, a change
 in the statements appearing on the "Government Label,"
 if any, used, (e) as to domestically bottled whiskey,
 brandy, rum, gin, vodka, rye liqueur, bourbon liqueur,
 rock and rye, rock and bourbon, rock and brandy, or
 rock and rum, a change in the proof stated, also a per-

missible change in proof for flavored brandy, flavored gin, and flavored vodka, (f) as to distilled spirits, a change in the period of age stated, (g) a change in the name and registry number of the distiller in the case of spirits bottled in bond, (h) as to wine, a change in the vintage date stated, (i) as to standard domestic wines, a change in the designation where itemized in 5B above (See Instructions E above), (j) as to wine a change in the registry number of the premises if shown on label, or (k) the addition of another label stating the name and address of the wholesaler or retailer, preceded by a descriptive phrase such as "bottled for," "selected for," or "imported for," and containing no reference to the product or any of its characteristics.

This certificate of label approval covers the identified products and authorizes their removal from the plant where bottled or packed, or from customs custody, for introduction in commerce, only if the packaging, marking, branding, and labeling and size and fill of the containers of such products comply with such Act and Regulations, and only if the contents of such containers conform to the statements and representations made thereon. This certificate shall not operate to relieve any person from liability for any violation of the Federal Alcohol Administration Act, or regulations issued thereunder.

9. Date issued: February 11, 1963

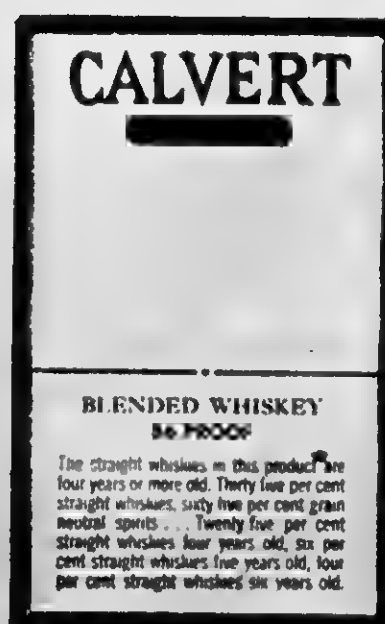
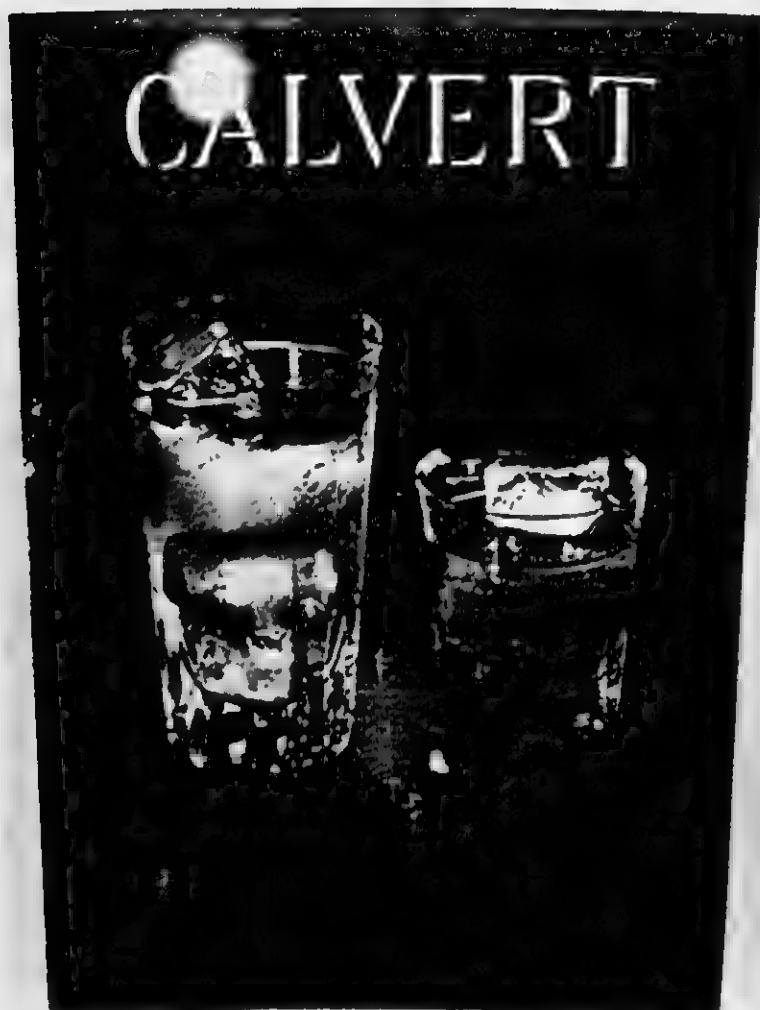
Director, Alcohol and Tobacco Tax Division:

/s/ Dwight E. Avis



APPROVED	LABEL APPROVAL	APP. SERIAL NO., IF ANY
FOR USE OF INTERNAL REVENUE SERVICE ONLY		
REMARKS		
<p>A STATEMENT OF NET CONTENTS MUST BE ELLOW OR BRANDED INTO BOTTLE OR CONTAINER.</p> <p>THIS CERTIFICATE AUTHORIZES THE BOTTLING OF PRODUCTS MADE IN ACCORDANCE WITH FORMULA <u>1</u> APPROVED <u>4-13-64</u></p>		

APPROX LABELS BELOW



119 A

U.S. GOVERNMENT PRINTING OFFICE: 1957 O - 316115

FORM 1649 (REV. 9-57)

17-6

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from the original bound volume

J. Government Exhibit 5. Pertinent Excerpts from Federal Alcohol Control Administration Regulations Relating to the Labeling of Distilled Spirits (Dated August 10, 1934)

FEDERAL ALCOHOL CONTROL ADMINISTRATION
Washington, D. C.

MISBRANDING REGS., SERIES 1, REV. 1
August 10, 1934.

**REGULATIONS RELATING TO THE LABELING OF
DISTILLED SPIRITS**

(Misbranding Regulations, Series 1, Revision 1)

By virtue of the authority vested in the Federal Alcohol Control Administration by Executive Order No. 6474, dated December 4, 1933, issued pursuant to Title I of the National Industrial Recovery Act, approved June 16, 1933, and by virtue of the authority vested in it by Codes of Fair Competition approved by the President for the following industries: Distilled Spirits Industry, Alcoholic Beverages Importing Industry, Distilled Spirits Rectifying Industry, and Alcoholic Beverage Wholesale Industry; —the Federal Alcohol Control Administration herewith prescribes and promulgates on this tenth day of August, 1934, the following Regulations which shall have the same force and effect as the provisions of said Codes of Fair Competition.

FEDERAL ALCOHOL CONTROL ADMINISTRATION

By J. H. Choate, Jr.
Chairman

* * * *

Section 1. *Application of Regulations.*—

(a) *Effective Date.*—The effective date of these Regulations is September 15, 1934, except as otherwise provided herein.

* * * *

Section 2. *Definitions.*—As used in these Regulations,—

(a) The term "Administration" means the Federal Alcohol Control Administration, and the term "director" means Director thereof;

(b) The term "member of the industry" means a member of the Distilled Spirits Industry, the Alcoholic Beverages Importing Industry, the Distilled Spirits Rectifying Industry, or the Alcoholic Beverage Wholesale Industry, as defined in the Code of Fair Competition, as now or hereafter amended, applicable to such industry;

* * * *

(e) The term "distilled spirits" means ethyl alcohol, hydrated oxide of ethyl spirits of wine, whiskey, rum, brandy, gin, and other distilled spirits, including all dilutions and mixtures thereof, for beverage, medicinal, culinary, or any other use except for industrial purposes, but does not include denatured distilled spirits or distilled spirits otherwise unfit for beverage use;

(f) The term "age" means the period during which, after distillation and before bottling, distilled spirits have been kept in oak containers, charred if for whiskey of American type.

Section 3. *Misbranding.*—* * *

(b) Distilled spirits in bottles shall be deemed to be misbranded—

* * * *

(3) If the bottle, or any label on the bottle, or any individual covering, carton, or other container of the bottle used for sale at retail, or any written, printed, graphic, or other matter accompanying the bottle to the consumer buyer, contains any statement that is untrue

in any particular, or directly or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific, or technical matter, tends to create a misleading impression of the distilled spirits.

Section 4. *Mandatory Label Information.*—There shall be stated—

* * * *

(c) On either the Brand Label, or on a separate label affixed in immediate proximity thereto on the same side of the bottle, or on a back label.

(7) Excessive coloring or flavoring, in accordance with Section 10 below, and

(8) If whiskey, age of straight whiskey, and respective percentages of straight whiskey, neutral whiskey and neutral spirits, in accordance with Section 11 below. The requirements of this paragraph (8) and of paragraph (7) shall all appear on the same label.

* * * *

Section 10. *Coloring, Flavoring, and Blending Materials.*—

(a) The presence in any distilled spirits of any coloring, blending, smoothing, or flavoring material (including malt whiskey used in blending other types of whiskey) need not be indicated unless such material causes the product to simulate another class or type of distilled spirits: *Provided*, That if the aggregate amount of coloring, blending, smoothing, or flavoring materials in any distilled spirits other than cordials, liqueurs, gins, gin fizzes, high-balls, bitters, and such similar distilled spirits as may be specified by the Administration from time to time, is in excess of 2½% by volume of such distilled spirits, then the name and amount in percent of volume of each such material shall be stated.

(b) The presence of beading oil in any type of whiskey shall be stated.

Section 11. *Age.*—

(a) *Age and Percentages for Whiskey.*—There shall be stated in the case of whiskey (except Scotch, Irish, and Canadian and Blended Scotch, Irish, and Canadian whiskey, as defined in the Regulations Relating to Standards of Identity (Misbranding Regulations, Series 4) and except straight whiskey bottled under the Bottling in Bond Act of the United States, in which cases statement of age shall be optional) the following:

- (1) The age of all types of straight whiskey; and
- (2) The age of neutral whiskey when unmixed with other types of whiskey or other distilled spirits.

The statement of age in cases under paragraphs (1) and (2) shall be as follows: "This whiskey (neutral whiskey) is ——— years (and/or months) old". If more than a year in age, months in excess of a year may be omitted, and

(3) In case of any of the types of blended whiskey and in case of spirit whiskey, the age of the straight whiskey (or if there be two or more straight whiskeys, then of the youngest straight whiskey) together with the percentage by volume of each of the following: the straight whiskey or whiskeys, the neutral spirits, and the neutral whiskey therein.

The statements of age shall be in the following form:

(A) If the whiskey contains neutral spirits or neutral whiskey, the statement of age shall be as follows, according to the number of straight whiskeys used: If one only: "The straight whiskey in this product is ——— years (and/or months) old"; or if more than one: "The straight whiskeys in this product are ——— years (and/or months) or more old",—the blank in each form to be

filled with a figure correctly stating an age not in excess of that of the youngest straight whiskey. If more than a year in age, months in excess of a year may be omitted.

(B) If the whiskey is a blend of straight whiskeys, the label, in addition to stating the age of the youngest straight whiskey, may state (1) the aggregate percentage and minimum age of the older whiskeys, or (2) the average age of all the whiskeys in the blend, or (3) the aggregate percentage and average age of the older whiskeys, the average in either case being an average weighted by volume.

(b) Representations as to Age.—If there is made any representation (including words or devices in any brand name or mark), relative to the age of any distilled spirits, the age shall also be stated on all labels where such representation appears, and in the same size and kind of type as such representation.

(c) Use of Word "Old".—The use of the word "old", or other word denoting age as part of the brand name, shall not be deemed to be a representation relative to age, if the word "brand" appears in direct conjunction with such brand name, in letters of equally conspicuous color and at least one-half the size of the type in which such brand name is printed. The use of the word "old" as part of the brand name of distilled spirits bottled in bond, gin, vodka, cordials, liqueurs, cocktails, gin fizzes, highballs, bitters, and such other distilled spirits as may be specified by the Administration from time to time, does not create a misleading impression, and the word "brand" need not appear in conjunction with such brand name, nor need the age in such case be stated.

* * * *

K. *Government Exhibit 10. Pertinent Excerpts from Transcript of Hearing Held Pursuant to Statute by the United States Treasury Department, Alcohol Tax Unit, Bureau of Internal Revenue on October 25, 1948 at Washington, D. C.—*

In the Matter of:

Proposals to Amend Regulations No. 5 (27 CFR Part 5) Relating to Labeling and Advertising of Distilled Spirits, etc.

TRANSCRIPT OF PROCEEDINGS

**UNITED STATES TREASURY DEPARTMENT
ALCOHOL TAX UNIT
BUREAU OF INTERNAL REVENUE**

In the Matter of:

**PROPOSALS TO AMEND REGULATIONS NO. 5
(27 C. F. R. Part 5) RELATING TO
LABELING AND ADVERTISING OF DISTILLED
SPIRITS; PRESCRIBING A STANDARD OF
IDENTITY FOR VODKA, AND FOR OTHER
PURPOSES.**

**Date: October 25, 1948
Washington, D. C.**

**ALDERSON REPORTING COMPANY
Official Reporters
306 Ninth St., N.W. Washington, D. C.
NA-1120-1121**

CONTENTS

Monday, October 25, 1948

<i>Statement of:</i>	<i>Page Number</i>
Howard T. Jones, Executive Secretary, Distilled Spirits Institute	14
Harry L. Lourie, National Association Alcoholic Beverage Importers, Inc.	20
B. G. Simpich, Chief Counsel, League of Distilled Spirits Rectifiers, Inc.	32
Harry A. Caddow, Secretary-Manager, Wine Institute	32
Frank M. Ludwick, representing Pierre Smirnoff, Fils., Inc.	34
Joseph Billik, Popper Morson Corp.	35
Abraham Tunick, American Distilling Company	44
I. F. Duaderman, Chief Chemist, Arrow Liquers Corporation	44
Abraham Tunick, 917-15th St., N. W., Washington, D. C., representing the American Distilling Company	52
Joseph C. Haeflin, Peoria, Illinois, associated with the American Distilling Company	60
Bruce Meeker of the Padre Vineyards Company, Cucamonga, California	63
William Montgomery Smith, representing Schenley Distilleries Corporation	64
Thomas Wood, 31 Newbury Avenue, Catonsville, Maryland, representing Joseph E. Seagram & Sons	75

[1] UNITED STATES TREASURY
 DEPARTMENT
 ALCOHOL TAX UNIT
 BUREAU OF INTERNAL REVENUE

In the Matter of

PROPOSALS TO AMEND REGULATIONS No. 5
(27 C. F. R. Part 5) RELATING TO
LABELING AND ADVERTISING OF
DISTILLED SPIRITS; PRESCRIBING A
STANDARD OF IDENTITY FOR VODKA,
AND FOR OTHER PURPOSES.

Great Hall, Department of Justice
Building,
Washington, D. C.
Monday, October 25, 1948.

Met, pursuant to notice, at 10:00 o'clock a. m.

BEFORE:

CARROLL E. MEALEY, Deputy Commissioner, Al-
cohol Tax Unit, U. S. Treasury Department,
Bureau of Internal Revenue, Presiding.

ALSO PRESENT:

JOHN L. HUNTINGTON, Assistant Deputy Com-
missioner, Alcohol Tax Unit, U. S. Treasury De-
partment, Bureau of Internal Revenue.

deVINCENT SIMONTON, In Charge of Alcohol Tax
Unit Division, of Chief Counsel's Office.

WALLACE A. RUSSELL, Esq., Attorney, Alcohol
Tax Unit.

DWIGHT E. AVIS, Assistant Deputy Commissioner,
Alcohol Tax Unit.

[2] ALSO PRESENT (Continued)

A. G. BARNHART, Chief, Label Section, Alcohol Tax Unit.

ARTHUR B. CECIL, Chief, Advertising Section, Alcohol Tax Unit.

R. O. JOLIN, Enforcement Supervisor, Alcohol Tax Unit, Washington, D. C.

WILLIAM H. KENNEDY, Assistant Deputy Commissioner, Alcohol Tax Unit.

DR. W. V. LINDER, Chief, Laboratory Division, Alcohol Tax Unit.

DR. PAUL SIMONDS, Laboratory Division, Alcohol Tax Unit.

[3] RECORD OF ATTENDANCE

JOSEPH BILLIK

630 Fifth Avenue, New York, New York, representing: Popper Morson Corporation.

W. R. BROWNBACK

1429 Walnut Street, Philadelphia 2, Pennsylvania, representing: Continental Distilling Corporation.

HARRY A. CADDOW

717 Market Street, San Francisco, California, representing: Wine Institute.

NICK CHEPER

2401 Clarendon, representing: Production Division, Seagram-Calvert.

JOHN N. COGGINS

900 National Press Building,
Washington, D. C., representing:
Wine Institute.

I. F. DAUDERMAN

9546 American Avenue, Detroit,
Michigan, representing: Arrow
Liqueurs Corporation.

WALTER J. DEVLIN

595 Madison Avenue, New York,
New York, representing: The
Fleischmann Distilling Corporation.

ONORMAN FORREST

1100 National Press Building,
Washington, D. C., representing:
National Distillers Products
Corporation.

ROBERT HANDREN

485 Fifth Avenue, New York, New
York, representing: Park &
Tilford Distillers, Inc.

F. P. HANKERSON

408 Olive Street, St. Louis 2,
Missouri, representing: Associated
Cooperage Industries of America, Inc.

HOWARD T. JONES

National Press Building, Washington,
D. C., representing: Distilled
Spirits Institute.

[4] RECORD OF ATTENDANCE

RAYMOND H. KASSER

55 North 2nd Street, Philadelphia, Pennsylvania, representing: Kasser Distillers Products Corp., Philadelphia, Pa.

F. J. LIND

405 Lexington Avenue, New York, New York, representing: Joseph E. Seagram & Sons, Inc.

HARRY L. LOURIE

700 National Press Building, Washington, D. C., representing: National Association Alcoholic Beverage Importers, Inc.

FRANK M. LUDWICK

901 Barr Building, Washington, D. C., representing: G. F. Heublein & Bro., Hartford, Conn.

R. BRUCE MEEKER

845 No. Alameda, Los Angeles, California, representing: Padre Vinyard Co.

FRANK M. SHIPMAN

1908 Howard Street, Louisville, Kentucky, representing: Brown-Forman Distillers Corp.

B. G. SIMPICH

837 Woodward Building, Washington, D. C., representing: League of Distilled Spirits Rectifiers, Inc.

131 A

Wm. MONTGOMERY SMITH

426 Union Trust Building,
Washington 5, D. C., representing:
Schenley.

J. R. STUETZ

3733 Albemarle Street, NW.,
Washington, D. C., representing:
Calvert Distilling Co.

ABRAHAM TUNICK

Washington, D. C., representing:
American Distilling Co.

THOMAS WOOD

31 Newberg Avenue, Catonsville,
Maryland, representing:
Jos. E. Seagram & Sons.

EDWARD W. WOOTON

900 National Press Building,
Washington, D. C., representing:
Wine Institute, 717 Market St.,
San Francisco, California.

[5]

PROCEEDINGS

OPENING STATEMENT

CHAIRMAN MEALEY: All right, gentlemen. Please come to order.

This is a hearing to consider certain proposed amendments to Regulations No. 5 under the Federal Alcohol Administration Act, Relating to Labeling and Advertising of Distilled Spirits, notice of which was published in the August 25th issue of the Federal Register. The hearing, which is a continuation of one opened in San Francisco on October 6, is held in accordance with the provisions of the basic statute, which require the Department to give reasonable public notice and afford to all interested parties an opportunity for hearing prior to issuing any amendments to these regulations.

* * * *

[14] STATEMENT BY HOWARD T. JONES,
EXECUTIVE SECRETARY,
DISTILLED SPIRITS INSTITUTE.

MR. JONES: Mr. Commissioner, my name is Howard T. Jones. I am Executive Secretary of the Distilled Spirits Institute. The Distilled Spirits Institute is a trade association of American distillers, having its address at 1135 National Press Building, Washington, D. C.

The Board of Directors has authorized me to present to you certain views with respect to the proposals on [15] which this hearing is being held. The views we present are expressed on behalf of the Institute as a whole, but it is likely individual members may have separate opinions to express on some items. If they have, we hope you will hear them, as it is not the desire or the intention of the Institute in presenting a group opinion

to restrict or limit in any manner the expression of the individual opinion of any of its members on any subject.

We would like to point out here, Mr. Commissioner, as we did in a previous hearing, that the Institute made no suggestions or proposals for incorporation in this hearing. We are, therefore, not the proponents of any of these proposals, and our comments are submitted on the basis of what we feel is for the benefit of the purchasing public and the industry.

* * * *

[18] MR. JONES: No. 10. We oppose the adoption of this proposal. No useful knowledge would be communi-
[19] cated to the purchaser by altering the present rule and allowing indirect reference to the age of neutral spirits, which is the substance of this proposal. Moreover, it would result in competitive claims that would exaggerate the importance of what is in fact a manufacturing process and further confuse the purchasing public. We feel the cause of informative labeling and advertising would not be advanced by this proposal.

* * * *

[20] Corrected in accordance with Mr. Lourie's letter of December 10, 1948

STATEMENT OF HARRY L. LOURIE,
IN BEHALF OF: NATIONAL ASSOCIATION
ALCOHOLIC BEVERAGE IMPORTERS, INC.

MR. LOURIE: My name is Harry L. Lourie; I am Executive Vice President of the National Association Alcoholic Beverage Importers, Inc., 700 National Press Building, Washington, D. C.

Mr. Commissioner, I have no prepared statement but I would like to comment, briefly on some of these proposals. I should like to make it clear that we are not concerning ourselves in purely domestic problems, but, in

view of what has happened to us in the past, we have some comment to make because we can foresee a possibility that in the future the adoption of some of these proposals may be thrown at us on the ground of discriminations.

* * * *

[28] With respect to Item 10, there again we come to something which is bound to cause trouble. The very brand "neutral spirits" should mean that the spirits are neutral. There is a great deal of difference in opinion as to what can be done with neutral spirits, but I think that if you will examine the scientific work done by your own laboratory you will find that the average neutral spirit [29] produced in the United States contain approximately three parts of congenics per 100,000. You will also find that no scientific investigation has as yet been devised which will determine what, if any, changes occurred when such spirits are stored in wooden casks, whether charred or uncharred. It is true that they would extract some of the wood extractives from the barrel but no one as yet has been able to determine scientifically that there has been a change.

Now, for the Commission to say that neutral spirits have been smoothed or cured, and so forth, by storage in wooden casks and similar containers, my comment runs in exactly the same trend as that Mr. Jones made a few minutes ago.

I think this will result in competitive advertising and labeling if the amendment is adopted.

* * * *

[60] STATEMENT OF JOSEPH C. HAEFELIN,
PEORIA, ILLINOIS,
ASSOCIATED WITH THE AMERICAN DISTILLING COMPANY.

Mr. Haefelin: My name is Joseph C. Haefelin, and I reside at Peoria, Illinois.

I am associated with The American Distilling Company and am in charge of production at the company's distilleries at Pekin, Illinois, and Sausalito, California.

I should like to present the company's position with respect to proposal 10.

Proposal 10 is designed to permit general and inconspicuous reference on back labels and in advertisements to production methods involving mellowing, softening, velveting and smoothing of neutral spirits through storage in oak cooperage for not less than six months.

It is the position of our company that the adoption of this proposal would constitute a considerable departure from the long established concept that spirits do not improve with age.

However, we feel that if the proposal is adopted, the type of container in which the spirits are stored should not be prescribed, but each distiller should be permitted to exercise his own judgment as to which method of storage produces the best result.

I should like to emphasize that the aging of neutral spirits does not constitute aging in the same sense as the [61] aging of whiskey. In the aging of whiskey esterification proceeds through the action of the organic acids present on the higher alcohol. This develops aroma. There is a selective penetration through the fibers of the barrel of the various congeners of the whiskey. This reduces the concentration after aging of some of the original congeners and increases others. The charred surface of the barrel also absorbs some of the fusel oil.

The composition of neutral spirits is such that the whiskey aging process described above cannot function in the same manner since neutral spirits contains an infinitesimal quantity of congeners.

We have stored substantial quantities of neutral spirits in oak barrels and in ventilated metal tanks, and our experience has demonstrated that the latter is the better method of softening freshly distilled neutral spirits.

During storage in ventilated metal tanks alcoholic vapors accumulate above the surface of the liquid and these vapors contain most of the infinitesimal quantity of congeners, particularly aldehydes which are responsible for the slight sharpness which is usually associated with freshly distilled neutral spirits.

Due to temperature changes during storage, the vapors dissipate themselves into the outside atmosphere through [62] the ventilated top of the tank, thus removing practically all of the sharpness. The resulting neutral spirits after six months of storage in this type of tank and under properly controlled temperatures, is a softer spirit than the same spirit stored six months in an oak barrel.

Moreover, we have observed that when neutral spirits are stored in reused whiskey barrels, which is the only type of cooperage used in the industry for this purpose, the spirits extract whiskey from the staves of the barrels and as a result take on a slight whiskey character without noticeably softening the spirits themselves, whereas, spirits stored in ventilated metal tanks in the manner outlined is truly a neutral spirit, has a higher degree of purity after storage, and is softer and smoother as a result of such storage.

The discussion of our company's experience with respect to the storage of neutral spirits should not be construed as opposition to the storage of spirits in oak containers, but rather in the event that proposal 10 is adopted, to emphasize the desirability of permitting each distiller to determine for himself the type of storage container which in his judgment produces the best result.

* * * *

[64] CHAIRMAN MEALEY: Mr. Lind?

MR. LIND (Joseph E. Seagram & Sons, Inc.) The position of my company has been set forth in the statement of Mr. Howard Jones.

CHAIRMAN MEALEY: Is there anyone else that wishes to be heard?

STATEMENT OF WILLIAM MONTGOMERY
SMITH, REPRESENTING SCHENLEY DISTIL-
LERIES CORPORATION.

MR. SMITH: In accordance with the announcement of hearings on proposed amendments to Regulations No. 5—labeling and advertising of distilled spirits: prescribing a standard of identity for vodka and for other purposes published at pages 4926-4927 et seq of the Federal Register of August 25, 1948, we desire to present a statement of our views with respect to certain of the proposals.

* * * *

[72] Proposal No. 10: Present regulations prohibit references to aging of neutral spirits under any circumstances. References to aging of related products such as gin and cordials are likewise prohibited. These prohibitions tend to preserve the distinction between such products and whiskey.

We think these requirements are salutary and proper. We, therefore, oppose proposal No. 10 even though it is presently very limited in scope.

Reference to velvety, mellowed or smoothed spirits even if general and inconspicuous seem to us to be improper for the reasons stated and subject to such possible abuse as to make adoption of this proposal unsound. Moreover, such references would be inconsistent with present distinctions between storage in new and reused barrels.

* * * *

[75] STATEMENT OF THOMAS WOOD, 31 NEW-
BURY AVENUE, CATONSVILLE, MARY-
LAND, REPRESENTING JOSEPH E. SEA-
GRAM & SONS.

MR. WOOD: My statement will be the same as that set forth by Mr. Howard Jones.

* * * *

- L. *Government Exhibit 11. Pertinent Excerpts from Transcript of Hearing Held Pursuant to Statute on November 28, 1956 at Room 3313, Internal Revenue Building, Washington, D. C., by the Treasury Department, Internal Revenue Service, Alcohol and Tobacco Tax Division, in Re:*

Proposal to Amend Regulations No. 5 (27 CFR Part 4) Relating to Labeling and Advertising of Distilled Spirits

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE
ALCOHOL AND TOBACCO TAX DIVISION

PROPOSAL TO AMEND REGULATIONS NO. 5
(27 CFR PART 4) RELATING TO LABELING
AND ADVERTISING OF DISTILLED SPIRITS

Room 3313, Internal Revenue Building
Washington, D. C.

November 28, 1956

WARD & PAUL
1760 Pennsylvania Ave., N.W.
Washington, D. C.

National	{	8-4266
		8-4267
		8-4268
		8-4269

[i]	CONTENTS	PAGE
STATEMENT OF		
Howard T. Jones, Executive Secretary, Distilled Spirits Institute, 1132 Pennsylvania Building, Washington, D. C.		18
Dr. C. S. Boruff, Technical Committee of D.S.I., Hiram Walker & Sons, Inc., Peoria, Illinois		20
Briggs G. Simpich, League of Distilled Spirits Rectifiers, Inc., 1001 Connecticut Avenue, Washington, D. C.		54
Porter R. Chandler, Scotch Whiskey Association, 15 Broad Street, New York 5, New York		59
William E. Kane, Austin Nichols & Company, 184 Kent Avenue, Brooklyn, New York		66
Harry L. Lourie, National Association Alcoholic Beverage Importers, Inc., National Press Building, Washington, D. C.		72
(Afternoon session—p. 116)		
Frederick J. Lind, Joseph E. Seagram & Sons, Inc.		116
Edward W. Wootton, The Wine Institute, Washington, D. C.		120

[ii]	CONTENTS	
STATEMENT OF		PAGE
Samuel A. Shacter, Carillon Importers, Ltd., Bardinet Export, Inc., New York, N. Y.		127
Abraham Tunick, American Distilling Company Washington, D. C.		134
Leo Vernon, Continental Distilling Corporation and Affiliated Subsidiaries of Publicker Industries, Inc., Philadelphia, Pennsylvania		135
Frederic P. Lee, The Distillers Company, Ltd., Linden, New Jersey		140
C. Norman Forrest, National Distillers Products Corp., Washington, D. C.		152
Robert S. Carr, Hiram Walker & Sons, Washington, D. C.		157

[1] TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE
ALCOHOL AND TOBACCO TAX DIVISION

PROPOSAL TO AMEND REGULATIONS No. 5
(27 CFR PART 5) RELATING TO LABELING
AND ADVERTISING OF DISTILLED SPIRITS

Room 3313, Internal Revenue Bldg.,
Washington, D. C.,
Wednesday, November 28, 1956.

Met, pursuant to notice, at 10:15 a.m.

PRESENT:

DWIGHT E. AVIS (presiding)
JOHN L. HUNTINGTON
WALLACE A. RUSSELL
ARTHUR G. BARNHART

APPEARANCES:

Porter R. Chandler
Scotch Whiskey Association
c/o Davis Polk Wardwell Sunderland
& Kiendl,
15 Broad Street,
New York 5, New York

Henry H. McGinnis,
G. F. Heublein & Bro.
330 New Park Avenue,
Hartford, Connecticut

J. P. McCarthy
Publicker Industries, Inc.
Continental Dist. Corp.
National Press Building,
Washington, D. C.

[2] APPEARANCES (Continued)

Leo Vernon,
Publicker Industries, Inc.
Continental Dist. Corp.
National Press Building,
Washington, D. C.

C. K. McClure,
Stitzel Weller Distillery
Sta-D-Louisville, Kentucky

Robert S. Carr,
Hiram Walker & Sons, Inc.,
1220 Penn Building,
Washington, D. C.

John G. Hodges
State Beverages Department of Florida,
411 First National Bank Building,
Tampa, Florida

G. K. Muirhead,
Heublein, Inc.,
330 New Park Avenue,
Hartford, Connecticut

Walter R. Woolley,
Laird & Company,
335 Broad Street,
Red Bank, New Jersey.

Howard T. Jones,
1132 Penna. Building,
Washington, D. C.

Samuel A. Shacter,
Carillon Importers, Ltd.,
Bardinet Exporters, Inc.,
11 W. 42nd Street,
New York 36, New York

[3] APPEARANCES (Continued)

Frederick J. Lind,
Joseph E. Seagram & Sons, Inc.,
Chrysler Building,
New York, New York

Edward W. Wootton,
Wine Institute,
1100 National Press Building,
Washington, D.C.

Frederic P. Lee,
The Distillers Co., Ltd.,
1200 18th Street, N.W.,
Washington 6, D. C.

Arthur L. Quinn,
Destileria Serralles, Inc., Ponce, Puerto Rico,
Puerto Rico Rum Institute, San Juan, P.R.,
1625 K Street, N.W.,
Washington 6, D. C.

Leo Vernon,
Continental Distilling Corp.,
Old Hickory Distilling Corp.,
Kinsey Distilling Corp.,
W. A. Haller Corp.,
1429 Walnut Street,
Philadelphia 2, Pennsylvania

Walter R. Brownback,
Continental Distilling Corp.,
Old Hickory Distilling Corp.,
Kinsey Distilling Corp.,
W. A. Haller Corp.,
1429 Walnut Street
Philadelphia 2, Pennsylvania

Dr. C. S. Boruff,
Technical Committee of D.S.I.,
Hiram Walker & Sons, Inc.,
Peoria, Illinois

[4] APPEARANCES (Continued)

Milton B. Seasonwein,
Schenley Industries, Inc.,
350 Fifth Avenue,
New York 1, New York

Abraham Tunick,
The American Distilling Company,
917 - 15th Street, N.W.,
Washington, D. C.

William E. Kane,
Austin Nichols & Company,
184 Kent Avenue,
Brooklyn, New York

Thomas R. McCarthy,
Austin Nichols & Company, Inc.,
Kent Avenue and No. 3rd Street,
Brooklyn, New York

Harry L. Lourie,
Executive Vice President,
National Association Alcoholic Beverage
Importers, Inc.,
700 National Press Building,
Washington, D. C.

O. Norman Forrest,
National Distillers Products Corporation,
920 Pennsylvania Building,
Washington 4, D. C.

Briggs G. Simpich,
League of Distilled Spirits Rectifiers, Inc.,
1001 Connecticut Avenue,
Washington, D. C.

NOTICE OF HEARING

Notice is hereby given, pursuant to the provisions of section 5 of the Federal Alcohol Administration Act (49 Stat. 981 as amended; 27 U.S.C. 205), of a public hearing to be held

On November 28, 1956, at 10 A.M., at Room 3313, Internal Revenue Building, Washington, D. C. On December 5, 1956, at 10 A.M. at St. Francis Hotel, San Francisco, California,

at which times and places all interested parties will be afforded opportunity to be heard, in person or by authorized representatives, with reference to the proposals, the [5] substance of which is stated below, to amend Regulations No. 5 (27 CFR Part 5), relating to labeling and advertising of distilled spirits.

Written data, views or arguments relevant and material to these proposals may be submitted in duplicate for incorporation into the record of hearing (1) by mailing the same to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington 25, D. C., provided that they are received prior to the termination of the hearing or (2) by presenting the same at the said hearing.

Material relating to each proposal shall be submitted separately and shall bear the number of the proposal to which it relates. At the conclusion of the hearing a reasonable opportunity will be afforded interested parties for examination of the record and for the submission of briefs.

SUBSTANCE OF PROPOSALS

* * * *

[12]

24. To amend section 39(e) (5) (27 CFR 5.39(e) (5)) to permit truthful references of a general and informative

nature relating to methods of production involving storage as to certain products, such as neutral spirits and gin, which are not entitled to bear age statements, provided they have been stored in oak containers for some specified minimum period, e.g., three months.

* * * *

[13] 30. To amend section 64(c) (27 CFR 5.64(c)) to permit truthful references of a general and informative nature relating to methods of production involving storage in advertisements for certain products, such as neutral spirits and gin, which are not entitled to bear age statements, provided they have been stored in oak containers for some specified minimum period, e.g., three months.

* * * *

DWIGHT E. AVIS

Director, Alcohol and Tobacco Tax
Division, Internal Revenue
Service

* * * *

[18] STATEMENT OF HOWARD T. JONES
REPRESENTING THE DISTILLED SPIRITS
INSTITUTE
1132 PENNSYLVANIA BUILDING,
WASHINGTON, D. C.

MR. JONES: Mr. Director and gentlemen, my name is Howard T. Jones, Executive Secretary of the Distilled Spirits Institute.

The Distilled Spirits Institute is a trade association of domestic distillers, with offices at 1132 Pennsylvania Building, Washington, D. C. The Board of Directors of the Institute has authorized me to present this statement [19] of our view with respect to the proposals on which this hearing is being held.

I am also authorized by Mr. Millard Cox to say on behalf of the Kentucky Distillers Association that they join in the comments which we are making here today.

The views we present are expressed on behalf of the Institute as a whole, but it is likely that individual members may have separate opinions to express on some items. If they have, we hope you will hear them, as it is not the desire or the intention of the Institute in presenting a group opinion to restrict or limit in any manner the expression of the individual opinion of any of its members on these proposals.

Item 1. The Institute has no objection to the adoption of this proposal.

* * * *

[42] Item 24. The Institute is opposed to the adoption of item 24. We are not informed from the proposal as written what products would be permitted to show on labels general and informative references to methods of storage. The proposal would include "certain products, such as neutral spirits and gin." We understand of course that it is intended to cover only products which are not entitled to bear age statement. This could include, in addition to neutral spirits and gin, cordials, liqueurs, cocktails, etc., none of which are entitled to claim age. Presumably the neutral spirits content of blended whiskies would also be covered.

These products traditionally have been prohibited from claiming age for the reason that no conclusive data is available that such products do age, or that they improve with storage in oak containers.

We recognize that this proposal refers only to "references of a general and informative nature", and understand that it does not contemplate statements of specific age nor statements that the products have been stored [43] in wood for a specific period of time. Presumably a statement such as "stored in wood" would be permitted.

If there is any single fact with reference to the production and storage of distilled spirits which is more commonly known to the consumer than any other, it is that certain products are aged by storage in wood containers. To the consumer, storage in wood is synonymous with age.

It cannot be disputed that a statement on the label of a blended whisky to the effect that the neutral spirit content was "stored in wood" might be a factual and truthful statement. There are many examples in FAA regulations, however, wherein the truthfulness or falsity of a statement is not the only criteria. The philosophy of the Act is firmly grounded on the prevention of consumer deception. We believe that the simple statement "stored in wood" on the label of any product not entitled to claim age is deceptive in the extreme.

* * * *

[46] Item 30. This item complements item 24 and we oppose it for the same reasons. In the interest of time such reasons will not be repeated here. It is requested that the reasons advanced with reference to item 24 be incorporated by reference in connection with this item.

* * * *

[54] STATEMENT OF BRIGGS G. SIMPICH
ON BEHALF OF LEAGUE OF DISTILLED SPIRITS
RECTIFIERS, INC., 1001 CONNECTICUT AVENUE,
WASHINGTON, D. C.

MR. SIMPICH: My name is Briggs G. Simpich. I am Assistant Chief Counsel of the League of Distilled Spirits Rectifiers, a trade association of the Independent Rectifiers in the country. Many of our members have individual views on many of these proposals. Some of them have no interest in them. Those members who are interested in most of these proposals will probably give their

own views because there wasn't uniform thinking on them but I desire at this time on behalf of the League to enter our objections to proposals No. 24 and 25.

Mr. Jones, who has just spoken to you on behalf of the Distilled Spirits Institute, has correctly pointed out that as drafted Amendment 24 is very vague in its terminology and might cover the whole group of products.

That of course is true. But we have endeavored to pinpoint this thing to see what is involved in this amendment and I believe it is pretty clear that the thing that inspires it are these gins that appeared in recent years on the market, colored gins and it is with respect to that particular phase of this broad coverage that I want to address myself briefly this morning.

[55] The rectifying industry, the independent rectifiers, who operate as such without a distillery connection, are very bitterly opposed to this proposition and I think the basis of their objection will be clearly understood if I may refer briefly to an event that occurred almost 45 years ago when the War Revenue Act of 1916-1917 was under consideration.

At that time there was first imposed a tax on the rectification of spirits of 15 cents a proof gallon. It was subsequently increased to the present 30 cents. But the bill as drafted in the House contained no exemption or exception in the case of gin and gin produced by a rectifier would have been taxed the same as any other rectified product. However, the late Mr. Levi Cook who was general counsel for the National Wholesale Liquor Dealers Association appeared before the Senate Finance Committee and objected to the bill in its present form; in the memorandum filed at that time Mr. Cook said "Gin is a compound liquor from time immemorial, a product of rectification. It is mixture of fine grain spirits at potable proof flavored with juniper berry. Prior to 1872 rectification could not be done on distillery premises. An Act of that year permitted rectification in distilleries if per-

formed in patented stills in one continuous process of distillation, redistillation and rectification through closed pipes and vessels.

[56] Today gin is made at the distilleries through closed pipes and vessels. The alcoholic vapor taking up the gin flavor in the last doubling before condensation. Likewise gin is made in the rectifying houses by redistilling tax-paid spirits and the addition of flavor therein as at the distillery.

The effect of this super tax would be to put 15 cents a wine gallon on the gin made in the rectifying house by a special tax paid rectifier in excess of the flat tax per proof gallon paid by a distillery finished gin.

The distillery finished gin could be tax paid at the flat rate and then reduced in proof without any further payment. Such a super tax would crush immediately the manufacture of gins in rectifying houses, some of the most famous brands of gin would forthwith be taxed out of existence, the owners' property rights destroyed.

Mr. Director, the last 39 and a half years the rectifiers have been on a parity with the distillers so far as cost-wise in producing gin. But inherent in this proposal is a proposition that will again tax them out of at least a portion of the gin field and what I am getting at is simply this: If a rectifier is to produce gin and store it for a period of months he stores tax paid spirits, that is evident and at \$10 and half a gallon it is commercially impossible to produce a type of gin similar to these colored [57] gins on the market and put them away for whatever period might be specified.

And it is altogether possible that with their huge advertising facilities, the producers of this type of gin might conceivably make the product so popular that it would cut into the gin field measurably and the rectifier would in effect be again taxed out of the gin field not by the imposition of a tax but in this case by a ruling of your department which would put him in a position where he

could not survive in the gin field, at least in the field of these so-called aged gins.

Now, aside from the economic feature of this thing, which is most critical, historically, as everyone in this room, knows, gin has been a clear liquid beverage as suggested by Mr. Levi Cook time immemorial.

It has never been aged because age contributed nothing to it. If this product is to be aged and again the regulation doesn't specify the type of cooperage, but considering all types, if it is put in a charred oak barrel, it is very evident that something definitely will happen to it even in a term of 3 months or a relatively short period.

Then I submit that the product ceases to be gin. And it should be put out under some fanciful name or whatever and should not be permitted to be designated as gin. [58] On the other hand, if it is meant that this product should be stored in a re-used parrafin barrel or in a new oak container and if the suggestion is made that nothing happens to it from such storage, then manifestly any reference to age is grossly misleading in that the consumer is led to believe that there was something happening to the product during its period of storage.

So on either approach, I say that this regulation insofar as it applies to gin is clearly something that should not be permitted because of the confusion to the consumer and it is violation of the traditional time honored character of gin as known to the consumer.

Mr. Director, I did not have a prepared statement at this time, because I want to watch the progress of this hearing and I presume that following your usual procedure we will be permitted to file something in rebuttal.

MR. AVIS: Oh, yes.

MR. SIMPICH: When the hearing is over.

MR. AVIS: Yes, you will, sir.

MR. SIMPICH: Accordingly with that brief summary of the position of our members I have nothing further to add at this moment.

MR. AVIS: Mr. Russell?

MR. RUSSELL: Will you file a list of your members of the association for the record?

MR. SIMPICH: Yes.

[59] MR. RUSSELL: In connection with your remarks as to the composition of gin, gin is composed not only of juniper berries and alcohol and water, there are other ingredients put in by some other people, aren't there?

MR. SIMPICH: Yes, some of them have 20 or more botanicals that are used. Yes, sir.

MR. RUSSELL: But you feel that possibly the storage of the gin in wood would make such a change in the product that it would no longer be gin, is that one of your approaches?

MR. SIMPICH: That is my one approach. Or if it does make a change, then it ought to be designated under some different name. It is no longer gin as known historically as Mr. Levi Cook suggested from time immemorial, it was a pure spirit.

* * * *

[72] STATEMENT OF HARRY L. LOURIE,
EXECUTIVE VICE PRESIDENT, NATIONAL
ASSOCIATION ALCOHOLIC BEVERAGE
IMPORTERS, INC.,
WASHINGTON, D. C.

MR. LOURIE: Mr. Director, my name is Harry L. Lourie, Executive Vice President of the National Association of Alcoholic Beverage Importers, Inc. at 700 National Press Building, Washington, D. C.

* * * *

[97] We are unanimously opposed to item No. 24.

Our reasons for opposing this may be entirely different than those offered by DSI. Our reasons for opposing it

are simply because for a great many years we were harassed, if I might use that rather strong term by a group of people who insisted that Scotch whisky contained neutral spirits which had been matured.

As a matter of fact they were not neutral spirits. Your own laboratory in the famous study made by Mr. Valaer proved it. They were whiskies. Even today there are people who claim that the grain whiskies used in Scotch whiskies are neutral spirits. That is Item No. 1.

I am afraid if neutral spirits are permitted a special designation because someone shoves them in a barrel and keeps them there that ultimately the same misconception will arise and we will again be the victims of what I call harassment.

In discussing this with my committee I didn't know as an ex-chemist how you improved neutral spirits that are really neutral.

Maybe there is a way. Maybe they take something out of a barrel. But if I have a good neutral spirit which [98] contains 3 or 4 parts congenics per hundred thousand, I would like to know what you improve in that unless you take some abstractions from the barrel.

I see no objection of anybody of putting gins and neutral spirits and vodkas in all the barrels they want, why should they get a special merit from it?

This is a departure from all practice in the trade or government control not only here but any country I have ever studied. I don't know how you improve neutral spirits. May I say that although you talk here about neutral spirits for gin and so forth, why should you discriminate against neutral spirits made out of grapes, out of brandy?

There are a lot of neutral spirits made in the United States out of wines. Certainly they should be entitled to the same privilege. Maybe somebody wants to make a fortified wine in the United States with neutral spirits

that have been aged in plain barrels in their case because they would not want the color.

If you are going to go in one direction why not continue in that direction and take them all in.

I am regarding this matter purely from the point of view of the consumer's reaction. I think the consumer's reaction would be perhaps erroneous. Let's use a mild phrase.

He might get the impression that there was a difference between a product made with so-called mature neutral spirits and one made with neutral spirits which have not been matured.

In any case we are unanimously opposed to it.

* * * *

[116] STATEMENT OF FREDERICK J. LIND,
REPRESENTING JOSEPH E. SEAGRAM & SONS,
INC.

MR. LIND: My name is Frederick J. Lind. I represent Joseph E. Seagram & Sons, Inc.

* * * *

[118] I would also like to comment on items 24 and 30, which relate to the general reference to age on labels and in advertising of neutral spirits and gin, Vodka, and so forth.

If, in fact, the distiller puts his neutral spirits in wood, and ages it, it is difficult to understand the basis on which he is going to be prevented from making that statement of fact.

I do not see how you can, or why you should, object, to the truthful statement.

I know it has been said that the truth can be deceptive. I am not prepared to believe that statement, but certainly it is not true in this case.

We know, and most distillers know, that aging in wood improves neutral spirits and gin. I am not a chemist, and

in fact, I am not interested in the chemistry of whiskey. There is only one test in which I am interested, and that is the test of taste. I defy anyone to prove to me that aging neutral spirits or gin in wood does not improve it.

After all, you should give us and other distillers some credit for some intelligence. We certainly wouldn't put [119] neutral spirits in wood and take the economic loss therefrom if we didn't think it was improving the product.

The opposition to these proposals seems to me to be an application of the very old principle, the idea of getting a competitive advantage through regulation. I thought we had outgrown that, but apparently we haven't.

I notice that Mr. Simpich says that we should prevent people from knowing the truth about Seagram's Gin and Schenley's Gin because otherwise they might not buy his gin and he would have an economic loss. I respectfully suggest that my friend, Mr. Simpich, is in the wrong department of the Government.

Mr. Lourie, in typically Lourian philosophy, indicates that if these proposals were adopted, it would somehow affect his work with Scotch whiskey. I do not follow my devious friend, but I respectfully suggest that because he may have more work to do is not a reason to oppose these proposals.

Mr. Lourie also says that the public might think there is a difference between aged neutral spirits and non-aged neutral spirits. There is a difference. All that the opposers' organization wants to do is keep the public from knowing about the difference.

This industry is the only industry I know of that is not taking advantage of technological improvements in the industry, and, in fact, cannot.

The fact of the matter is that our technological development is stymied to a great extent by regulation.

Fortunately, those regulations are being changed from [120] time to time, but the progress is ponderously slow. We are also impeded in technological improvements by a number of people who feel that what was good enough for their grandfathers is good enough for them and that what is good enough for them is good enough for everybody else.

The Scotch, the Canadians, and the Irishmen, and everybody else do not feel that way, and that may account for the standing of the Canadian and Scotch and Irish products as compared with our own products.

That is the end of my statement, gentlemen.

* * * *

[135] STATEMENT OF LEO VERNON,
1429 WALNUT STREET, PHILADELPHIA,
PENNSYLVANIA,
REPRESENTING THE CONTINENTAL DISTILLING
CORPORATION
AND OTHER DISTILLING SUBSIDIARIES OF
PUBLICKER INDUSTRIES, INC.

MR. VERNON: I am Leo Vernon, of 1429 Walnut Street, Philadelphia, Pennsylvania.

I am appearing on behalf of the Continental Distilling Corporation and other distilling subsidiaries of Publicker Industries, Inc.

We favor Proposals Nos. 2, 10, 16, 19, 20, 21, 22, 25 and 26. We also favor Proposals No. 24 and 30, provided that they are made prospective in their application in the event any amendments on this proposal are adopted.

* * * *

[140] STATEMENT OF FREDERIC P. LEE,
OF THE LAW FIRM OF LEE, TOOMEY, AND KENT,
RING BUILDING, WASHINGTON, D. C., REPRESENTING THE DISTILLERS COMPANY, LIMITED,
LINDEN, NEW JERSEY

MR. LEE: Mr. Director and gentlemen, my name is Frederic P. Lee. I am a member of the law firm of Lee, Toomey, and Kent, in the Ring Building, Washington, D. C.

I am appearing on behalf of the Distillers Company, Limited, of Linden, New Jersey. I emphasize the Linden, New Jersey, in order that this domestic company may not be confused with the Distillers Company, Limited of Edinburgh, Scotland.

My statement relates to Proposals Nos. 24 and 30. These proposals would permit in the labeling and advertising the truthful references of a general and informative nature relating to the methods of production, involving storages to certain products, such as neutral spirits and gin, which are not entitled to bear age statements, provided they have been stored in wood for some specified minimum period, for example, three months.

The Distillers Company, Limited, is strongly opposed to the adoption of Proposals 24 and 30. The company produces clear gin and gin-based cocktails. We approve the position taken by the Distilled Spirits Institute on these proposals in opposition to them.

[141] We are not members of the Institute and would like to present to you our own individual views on the matter.

We also approve the positions taken by the Association of Alcoholic Beverage Importers and the Distilled Spirits Rectifiers. It should be pointed out that these proposals have a rather broad coverage.

They would, as we understand them, apply not only to neutral spirits and gin, but also to vodka and cocktails,

liqueurs and cordials, and all the other items that are not entitled to state age.

Neither is it said in the proposals what kind of wood is in mind, whether new or re-used, or for that matter, paraffin barrels, but the remarks I have to make would apply irrespective of the kind of wood.

Finally, it seems to us that the proposal involves such statements as "mellowing", "softening", "velveting", "smoothening", refer to such processes—speaking of them euphonistically and somewhat imaginatively and also "mellowed in oak casks," or "stored in wood".

It was pointed out this morning that the proposal did not contemplate such statements as "stored six months in wood", though as stated, the proposal is broad enough to permit such statements, also.

But the adoption of these proposals, Mr. Director, would reveal a regulation and regulatory policy that has [142] been in effect ever since, or close after, the repeal of the prohibition amendment.

That regulation and that policy as stated then, was age and maturity and similar representations as to neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs, and bitters are misleading and shall not appear on any label.

When a policy has been in effect that long and when it has become known to the trade and to the consumer, it should take an overwhelming amount of factual data to upset it. There has not been offered any such data at this hearing so far.

There has been only the bare assertion, as a matter of fact, of Mr. Lind that such products do improve. Let's turn to the statements on "mellowing" and "velveting" and "mellowed in oak casks" and "stored in wood" and the like—what is their nature?

Quite obviously, they are age statements without using the word "age". They are not age in the sense of mere

passage of time, but age in the sense of improvement in quality.

The only purpose of such statements is to convey the impression that the products have aged and improved with storage in wood. Usually, the wood would be re-used whiskey barrels. That statement of the misleading character, the impression tried to be given, has been recognized by the Treasury Department for years.

[143] Back in 1937 the Department stated that bottling dates, distilling dates, and words such as "old" and "mature" are representations denoting age or maturity, and are, therefore, prohibited from appearing on labels for neutral spirits, gin, vodka, and so forth, due to the fact that they are considered misleading; and the Treasury Department, contrary to its usual practice, underscored a word in its own ruling.

It underscored the word "misleading", so that I assume that even the Treasury Department felt very strongly of the view that statements such as "old" and "mature" when applied to neutral spirits and gin, and so forth, were misleading, and wanted to have no misunderstanding on the subject at that time.

The only defense that has been suggested to such statements at the moment has been that they are truthful statements. The Act itself, as you well know, Mr. Director, imposes a duty upon you and the Secretary to prohibit, irrespective of the falsity—that means even though they may be true—statements relating to age or manufacturing processes that the Secretary finds likely to mislead the consumer.

Clearly, these statements, as Mr. Jones stated this morning, to the consumer mislead him in that they give the impression of improvement with storage.

Then the Treasury Department, itself, has said they are misleading. Truth is not always a defense. It is not a defense when the truth is used for a misleading purpose.

[144] and perhaps as apt a statement on that as has been made was the one made by Judge Rose in the United States District Court in New York, a good many years ago, when he said: "One who with intent to deceive tells what is truth in a sense in which he knows it will not be understood is not a whit better than he who affirms something which he knows to be false in every aspect."

Even the ordinary oath requires that you state not only the truth, but the whole truth, and here the whole truth would be stored in wood but not improved in quality by such storage. That would be the only way we could prevent misleading the consumer.

I mentioned that you are reversing a policy that was long ago established. I think perhaps just a word on that is worth your consideration because it is a policy you have repeated and affirmed and even as recently as eight years ago reconsidered and still maintained your position and has anything happened since that that should cause an alteration of that? The present Regulation is based on a ruling in 1934 which it adopted almost verbatim that ruling which said that age and maturity and similar statements or representations as to neutral spirits, gin, vodka, and so forth, are misleading and are prohibited. It did not say why, but a month later an additional ruling was gotten out in which it was said—this was No. 57, the earlier ruling—and then this one was No. 4, which said in the opinion of the Administration the distilled spirits [145] specifically named in the ruling referred to the one I just read, the type of distilled spirits whose quality does not improve with age and the ruling in question was predicated upon the ground that being meaningless, such representations of age with respect to these spirits would be misleading to the consumer.

Shortly after that, the ruling was put in the form of a regulation, and then it became a part of the present regulation, and it remained in effect.

In 1948 the Department held on October 25th a hearing to modify that regulation. It was proposed then by the Department to except from the prohibition again statements and representations referring to age and maturity if general and inconspicuous references of an informative nature were made on the back labels and could be used in advertising referring to production methods involving mellowed, velveting, softening, or improving neutral spirits through storing in oak casks for a period of not less than six months.

That is no different than what you have today except that it was limited to neutral spirits and did not have gin and vodka and had a period of six months rather than three months.

I examined the transcript of that hearing. At that time no industry member supported the proposal, not even Seagrams or Continental. The Distilling Spirits opposed it, as now.

Mr. Jones stated that the adoption of any such proposal would communicate no useful knowledge to purchasers [146] and would result in competitive claims that would exaggerate the importance of a manufacturing process and confuse the purchasing public.

He stood then, as he stands today, on the subject. The National Association of Alcoholic Beverage Importers then, as now, opposed it. Mr. Lourie then stated that the proposal was bound to cause trouble and would result in competitive labeling and advertising. I think the implications of those two statements are fairly obvious to all of us.

There was no evidence offered that neutral spirits improved by being stored in wood, just as so far in the progress of this hearing, there has been no such evidence. [147] There was one company that said while it didn't favor the proposal, neither would it oppose it, but it stated—and this is most interesting—if the proposal

were adopted, it should be amended to include ventilated metal tanks as well as in wood. They gave a reason that storage of neutral spirits in ventilated metal tanks makes a softer neutral spirit than oak barrels, and if you store it in oak barrels, it takes on a whiskey flavor without noticeably softening the spirits.

I think your conclusion upon that record was, as I think the conclusion will be from this record, that the great bulk of the industry opposed this change in the regulatory policy. There was no evidence offered to support such a change, and, in any event, your predecessor and the Secretary did not adopt the proposal.

If you place neutral spirits in wood, I suggest to you that at that moment the neutral spirits are no longer neutral and are no longer entitled to be characterized as neutral spirits, and you would have no claim as to maturing neutral spirits.

They cease to be that, and I make that point seriously.

In the case of Vodka, you have already ruled that if Vodka so much as absorbs color from wood, it changes character and is no longer Vodka and cannot be so called, but has to have a fanciful name.

[148] In the case of gin, I would like to point out to you that for a good many years past when it comes to bottling in bond, gin as well as other whiskies may be bottled in bond, you had a special regulation as to the eligibility for bottling in bond on gin, and there you say the gin to be bottled for domestic purposes must have been stored continuously for at least four years in wood lined with paraffin or another substance which will preclude contact of the spirits with the wood surface and prevent absorption of the wood color and flavor.

Obviously, at least to me, and I hope to you, the bottled in bond regulations recognize that gin is traditionally a neutral product except for flavoring with juniper berries and other aromatics, and that any changes that occurred in it by reason of the storage in wood that was not paraf-

fin lined and did not preclude contact with the wood surface and would not prevent absorption of the wood color and flavor, would not be gin.

I suggest to you that there can be no such product as golden gin. That is a gin that is derived characteristically from contact with wood. That very contact in the spirit of the bottling in bond regulations destroys the character of the product as gin.

To permit maturity statements such as golden gin, mellowed in wood, is to compound the offense by adding a [149] misleading statement to a misleading type designation.

Let me summarize a moment. This proposal would refute a regulation that has been in effect twenty-two years, and it does so as far as the 1948 record is concerned, and as far as this record is concerned—you would without any newly disclosed facts or date that would justify a statement that places such products as neutral spirits and gin in wood improves their quality, so that the statement would not be misleading to the consumer.

Adoption of these proposals would promote consumer deception, in our judgment, by misleading references to age and to manufacturing processes, and it would involve adoption of a regulation which is contrary to the statutory standard against such misleading age and manufacturing process statements. It is a statutory standard, we believe, that binds the adoption of regulations in this field, the adoption of the proposals that also force industry competition on the low level of misleading labeling in advertising—and I believe that is one of the things Mr. Lourie had in mind in his statement in 1948—the adoption of these proposals would give a temporary advantage to producers having inventories of gin or Vodka stored in reused barrels.

Mr. Vernon recognized that when he limited his support to prospective adoption.

Finally, adoption of the regulations would give a

[150] permanent advantage to those who produce gin or Vodka under distillers' permits as against those who produce it under rectifiers' permits.

The Distillers Company, Limited, nevertheless, sees no reason for such permanent advantage being given to those who produce under distillers' permits.

I take it that was the point that Mr. Simpich was trying to emphasize in his statement this morning, the almost inevitable result of that would be that following the adoption of any such regulation as this, a regulation permitting regular age claims on gin and Vodka and a regulation permitting regular age claims for neutral spirits content on blended and spirit whiskies.

There might be an incidental effect of adopting such a regulation which would be to validate some of the label advertising claims of maturity that have recently been used but are questionable from a legal standpoint under the present regulations—but that is no basis for adoption of these regulations.

We think, Mr. Director, that it is intended to prevent consumer deception and that these proposals fly directly in the face of that statutory standard; and if such proposals would only be used to promote deception and that it would promote those who might want to enter into such a competitive situation.

[151] Thank you, sir.

Might I ask, Mr. Director, would you permit questions to be asked of your chief chemist on the matter of the improvement of neutral spirits and gin in wood, and that it be made a part of this record?

MR. AVIS: Mr. Lee, I would be perfectly willing to have you submit any questions that you might want to propound to our chief chemist, and I will give it consideration as to whether or not we might—

MR. LEE: You mean, submit them at this time?

MR. AVIS: At any time before we terminate the hearings in San Francisco.

You understand that we are going to take the testimony on the proposals on December 5 in San Francisco. If they are submitted prior to that time, I will then determine whether I will continue the hearing so as to permit him to testify on that subject.

I make no determination now. Certainly, I would want to deal with this thing on its merits, whatever they are, and I will be glad to have the questions submitted and to consider whether or not he should give testimony on that subject and whether the hearing should be continued for that purpose.

MR. LEE: Thank you, sir.

As I understand it, you would prefer to have them submitted in writing, so that you can consider them first.

[152] MR. AVIS: I certainly would, sir.

MR. LEE: Thank you, sir.

MR. AVIS: Who is the next witness?

MR. FORREST: I will speak, Mr. Director.

MR. AVIS: Very well, Mr. Forrest.

STATEMENT OF O. NORMAN FORREST,
WASHINGTON REPRESENTATIVE OF NATIONAL
DISTILLERS PRODUCTS CORPORATION, 920
PENNSYLVANIA BUILDING, WASHINGTON, D. C.

MR. FORREST: My name is O. Norman Forrest. I am the Washington representative of National Distillers Products Corporation with offices at 920 Pennsylvania Building, Washington, D. C.

National Distillers Products Corporation is a member of the Distilled Spirits Institute, the views of which have been presented here this morning in full detail.

Our company acquiesces in the views expressed by Mr. Jones on behalf of the Distilled Spirits Institute except in connection with proposal numbered 16.

* * * *

M. *Government Exhibit 12. Pertinent Excerpts from Transcript of Hearing Held Pursuant to Statute on December 5, 1956 at San Francisco, California, by Treasury Department, Internal Revenue Service, Alcohol and Tobacco Tax Division, in Re:*

Proposal to Amend Regulations No. 5 (27 CFR Part 5) Relating To Labeling and Advertising of Distilled Spirits

**TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
ALCOHOL AND TOBACCO TAX DIVISION**

**PROPOSAL TO AMEND REGULATIONS NO. 5
(27 CFR PART 5) RELATING TO LABELING
AND ADVERTISING OF DISTILLED SPIRITS.**

San Francisco, California

December 5, 1956.

Pages 1-48

**Reported by:
Ernest Capoferri.**

**STENOTYPE REPORTING COMPANY
12 Geary Street
San Francisco 8
SUtter 1-2201**

[i]	CONTENTS	PAGE
STATEMENT OF		
Don W. McColly, Wine Institute, 717 Market Street, San Francisco, California		20
James L. Riddell, Vie-Del Grape Products Co. 2808 E. Nebraska Avenue, Fresno, California. (Wine Institute)		21
L. N. Bianchini, United Vintners, Allied Grape Growers, 601—4th Street, San Francisco, California		28
Otto E. Meyer, Fromm & Sichel, Inc., 717 Market Street, San Francisco, California		31
Harol E. Roush, Wine Growers Guild, P. O. Box 579, Lodi, California		36
James E. Woolsey, 582 Market Street, San Francisco, California		38
Milton B. Seasonwein, Schenley Industries, Inc., 350 Fifth Avenue New York 1, New York		42
Robert E. Pepper, Lewis Westco Company, 220 Front Street, San Francisco, California		47

[1] TREASURY DEPARTMENT
 INTERNAL REVENUE SERVICE
 ALCOHOL AND TOBACCO TAX DIVISION

PROPOSAL TO AMEND REGULATIONS No. 5
(27 CFR PART 5) RELATING TO LABELING
AND ADVERTISING OF DISTILLED SPIRITS

Borgia Room, St. Francis Hotel,
San Francisco, California,
Wednesday, December 5, 1956.

Met, pursuant to notice at 10:10 a.m.

PRESENT:

DWIGHT E. AVIS (presiding)
JOHN L. HUNTINGTON
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APPEARANCES:

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APPEARANCES (Continued)

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- Howard Jones,
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- Harol E. Roush,
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- Milton B. Seasonwein,
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- Howard E. Somers,
St. Charles Winery,
Grapeview, Washington.
- James E. Woolsey,
Brandy Distillers Corporation,
582 Market Street,
San Francisco, California.

NOTICE OF HEARING

Notice is hereby given, pursuant to the provisions of section 5 of the Federal Alcohol Administration Act (49 [4] Stat. 981 as amended; 27 U.S.C. 205), of a public hearing to be held

On November 28, 1956, at 10 A.M., at Room 3313, Internal Revenue Building, Washington, D. C.

On December 5, 1956, at 10 A.M., at St. Francis Hotel, San Francisco, California,

at which times and places all interested parties will be afforded opportunity to be heard, in person or by author-

ized representative, with reference to the proposals, the substance of which is stated below, to amend Regulations No. 5 (27 CFR Part 5), relating to labeling and advertising of distilled spirits.

Written data, views or arguments relevant and material to these proposals may be submitted in duplicate for incorporation into the record of hearing (1) by mailing the same to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington 25, D.C., provided that they are received prior to the termination of the hearing, or (2) by presenting the same at the said hearing. Material relating to each proposal shall be submitted separately and shall bear the number of the proposal to which it relates. At the conclusion of the hearing a reasonably opportunity will be afforded interested parties for examination of the record and for the submission of briefs.

[5] SUBSTANCE OF PROPOSALS

1. To amend article I (27 CFR 5.1) to add a definition of domestic distilled spirits which would include imported cordials or liqueurs rectified in the United States by the addition of sugar or sugar and water solution.

2. To amend section 21, class 2 (27 CFR 5.21(b)) and other pertinent sections of the regulations to increase the maximum proof at which whisky may be withdrawn from the cistern room at the distillery to a specified proof not higher than 160°, e.g., 120° proof; or, in the alternative, if the hearing does not develop sufficient data to provide for the normal barreling of whisky at a higher proof, to amend section 21, class 2 (27 CFR 5.21(b)) and other pertinent sections of the regulations so as to provide that not more than 1,000 barrels of whisky barreled by a single distiller for experimental purposes at not more than 160° proof may be labeled, when bottled, under the designations which would have been applicable if the product had been withdrawn at not exceeding 110° proof.

3. To amend section 21, class 2(h) (27 CFR 5.21(b) (8)) and other pertinent sections of the regulations to eliminate the class and type designations "blended rye whisky" (rye whisky—a blend) "blended bourbon whisky" (bourbon whisky—a blend), "blended corn whisky" (corn whisky—a blend), "blended wheat whisky" (wheat whisky—a blend), "blended malt whisky" (malt whisky—a blend), and "blended rye malt whisky" (rye malt whisky—a * * *

* * * *

[11] 24. To amend section 39(e) (5) (27 CFR 5.39(e) (5)) to permit truthful references of a general and informative nature relating to methods of production involving storage as to certain products, such as neutral spirits and gin, which are not entitled to bear age statements, provided they have been stored in oak containers for some specified minimum period, e.g., three months.

* * * *

[12] 30. To amend section 64(c) (27 CFR 5.64(c)) to permit truthful references of a general and informative nature relating to methods of production involving storage in advertisements for certain products, such as neutral spirits and gin, which are not entitled to bear age state-
[13] ments, provided they have been stored in oak containers for some specified minimum period, e.g., three months.

* * * *

(signed) Dwight E. Avis
Director, Alcohol and Tobacco Tax Division
Internal Revenue Service

* * * *

[42]

STATEMENT OF MILTON B. SEASONWEIN
SCHENLEY INDUSTRIES, INC.
NEW YORK, NEW YORK

MR. SEASONWEIN: My name is Milton B. Seasonwein of 350 Fifth Avenue, New York 1, New York. I appear on behalf of Schenley Industries, Incorporated, and its subsidiaries.

I should like to state briefly in most cases our position on the several proposals.

* * * *

[45] We oppose Items Nos. 23 and 24, but approve of Items Nos. 25 and 26.

* * * *

We are in opposition to Items Nos. 28, 29, and 30 and, of course, our views on Item No. 31 are as expressed by Mr. Woolsey.

* * * *

N. Government Exhibit 13. Memorandum Dated January 10, 1957 Submitted by League of Distilled Spirits Rectifiers, Inc., Washington, D. C. to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, on Behalf of the League's Members, in Opposition to Proposals 24 and 30 in Notice of Hearings on Proposed Amendments to Regulations 5 (27 CFR Part 5) Relating to Labeling and Advertising of Distilled Spirits

LEAGUE OF
DISTILLED SPIRITS RECTIFIERS, INC.

1001 Connecticut Ave.

Washington 6, D. C.

January 10, 1957

Dwight E. Avis, Director,
Alcohol and Tobacco Tax Division,
Internal Revenue Service,
Washington 25, D. C.

Sir:

The following memorandum is submitted by the League, on behalf of its members, in opposition to Proposals 24 and 30 in Notice of Hearing on proposed amendments to Regulations 5 (27 CFR Part 5) relating to labeling and advertising of distilled spirits, and published in the Federal Register of October 31, 1956 (pp. 8321-8322).

Hearings were held on these proposals in Washington, D. C. on November 28, 1956, and in San Francisco, California on December 5, 1956. At the time of the hearing in Washington on November 28, the League noted its objection to proposals 24 and 30, and this memorandum is filed in amplification of comments made at that time, and pursuant to leave granted.

Proposals 24 and 30 are as follows:

"24. To amend section 39(e)(5)(27) CFR 5.39
(e)(5) to permit truthful references of a general

and informative nature relating to methods of production involving storage as to certain products, such as neutral spirits and gin, which are not entitled to bear age statements, provided they have been stored in oak containers for some specified minimum period, e.g., three months."

"30. To amend section 64(c) (27 CFR 5.64(c) to permit truthful references of a general and informative nature relating to methods of production involving storage in advertisements for certain products, such as neutral spirits and gin, which are not entitled to bear age statements, provided they have been stored in oak containers for some specified minimum period, e.g., three months."

While the proposals refer to "products, such as neutral spirits and gin", this memorandum is directed primarily to the latter product. Furthermore, we are interested only in that type of gin generally referred to as English, or London Distilled Dry Gin, which is the common variety distilled in the United States, as distinguished from Hollands or Geneva type gin.

Historically, London Distilled Dry Gin was never aged in wood. Grossman's Guide to Wines, Spirits and Beers. (3rd Ed., 1954); American Peoples Encyclopedia, Vol. 9, p. 583. In his discussion of "London Dry Gin," as made in England, Grossman (p. 226) first describes the process of distillation and then concludes:

"The new spirit that comes out is of a much higher proof than the 120° proof at which it was placed in the still, and it must be reduced again by distilled water. The gin is not placed in a wooden vessel—it is placed in a glass-lined vat. Gin is never aged."

The author also refers to the fact that American gin, or gin made in the United States, differs only in the fact that the English gins may have "a little more character" due chiefly to the fact that in England spirits are distilled out at a lower proof (p. 227). He further states that

" * * * there is no purpose in aging our own gins, as the flavoring is used to make the new spirit palatable, and this quality is not improved by aging in wood." (p. 229).

In the American Peoples Encyclopedia it is stated:

"Gin is generally stored in glass-lined vats or tanks in a cool, air-conditioned cellar. Unlike rum or brandy, it is never aged in wood."

Accordingly, when the Standards of Identity were adopted, after extensive hearings, no provision was made for claiming age in the case of gin for the very simple reason that storage of gin in oak containers was a thing that had never been done or heard of.

It appears however that during the emergency period when steel drums were not available a few industry members stored gin in reused barrels which had been paraffined. Presumably the paraffining was not adequate and the gin took on color from the wood. Thus there was born the first colored gin. Whether or not this is the true situation it is a fact well known to the Director that a few producers are now storing gin in wooden containers for limited periods and there are on the market several colored gins. Their color is presumably due to the fact that during storage color is extracted from the barrel. One such producer is Seagrams, and this Company alone has advocated the adoption of the proposed amendments. Continental Distilling Corporation favored the amendments but only if they were prospective in form.

In view of the historic background of the product it is respectfully suggested that the Director erred in ever permitting these colored products to be labeled as London distilled dry gin, or gin. However that matter is not now before us. What we are concerned with is the hazard of compounding the error by permitting any statement on a label of gin which in any manner indicates that

the product has been aged by storing in wood. Clearly a statement that gin had been "stored in oak barrels" for three months would have the same significance to the consumer as a statement that it had been "aged" for such period. The present proposals add up to an adroit means of circumventing the existing regulations which, in effect, prohibit age statements in the case of gin, since no provision is made therefor. This "back-door" approach has been condemned and prohibited by your office in the consideration of numerous applications for label approval where industry members have endeavored to accomplish indirectly something proscribed by the regulations.

Down through the years consumers have learned that gin is a crystal clear spirit without age. A change at this time which would permit a new colored product to use the designation "gin" together with a statement of storage in wood could only result in utter confusion to the consumer. More especially so when accompanied by the vast advertising program which would doubtless be put on by a concern of the magnitude of Seagrams. Such a situation would result in irreparable damage and injury to industry members producing authentic gin, as the product has been known for centuries.

The situation is particularly grave from the standpoint of the rectifier. Whereas a distiller may store his finished gin in oak barrels, prior to bottling and tax-payment, the independent rectifier must pay the distilled spirits tax of \$10.50 per proof gallon on his spirits prior to re-distillation in the production of gin. With one or two exceptions the members of the League are small concerns with limited capital who have found it difficult to survive in the face of competition with the large distilling companies with their unlimiting advertising budgets. If these new colored gins are popularized by deceptive advertising producers of authentic gin will be compelled to produce a similar product in order to meet competition.

But with a tax investment of \$10.50 a gallon, rectifiers cannot afford to store gin for even a few months.

The Congress carefully safeguarded the interests of the rectifier so that no unfair advantage inured to the distiller when the rectifying tax was first imposed by the War Revenue Act of 1917. Thus gin was exempted from that tax when produced in the same manner as at a distillery. Later Vodka was accorded the same exemption. (P.L. 355, 82nd Cong. 2nd Sess.) Congress having clearly expressed a desire to place the rectifier on a fair competitive basis with the distiller in the production and sale of gin, the Treasury officials in charge of administering the law should not defeat that purpose in the absence of most compelling reasons and circumstances. No such reasons exist insofar as this controversy is concerned. On the contrary it is to the best interests of the consumer that confusing statements as to storage in wood should not appear on labels of gin, which is one of the oldest and best known types of distilled spirits.

For the reasons stated, it is urged that proposals 24 and 30 be not adopted.

A list of the members of the League is attached hereto. The position taken by the League on these proposals is endorsed by A. & G. J. Caldwell of Newburyport, Massachusetts.

Respectfully submitted,

LEAGUE OF DISTILLED SPIRITS RECTIFIERS, INC.

By: B. G. Simpich,
BRIGGS G. SIMPICH,
Assistant General Counsel.

BGS/a
encl.

LIST OF MEMBERS OF THE LEAGUE OF
DISTILLED SPIRITS RECTIFIERS, INC., AS OF
JANUARY 1, 1957

Alexander Young Distilling Co.
708 South Second Street
Philadelphia, Pennsylvania

Austin, Nichols & Co. Ltd.
Kent Avenue & N. 3rd Street
Brooklyn, New York

Mr. Boston Distiller Inc.
1010 Massachusetts Avenue
Boston 18, Massachusetts

Bohemian Distributing Company
2254 East 49th Street
Los Angeles 58, California

The Distillers Company, Ltd.
620 Fifth Avenue
New York, New York

Esbeco Distilling Corporation
25 Jefferson Street
Stamford, Connecticut

Sidney B. Flashman Co., Inc.
70 Scollay Square
Boston 8, Massachusetts

The Samuel Freedman Company
First National Bank Building
Cincinnati, Ohio

Heublein, Inc.
330 New Park Avenue
Hartford 1, Connecticut

Kasser Distillers Products
3rd & Luzerne
Philadelphia, Pennsylvania

Ed. Phillips & Sons Co.
Northwest Terminal
Minneapolis, Minnesota

Cointreau, Ltd.
445 Park Avenue
New York 22, New York

Sazerac Co., Inc.
2231-2237 Decatur Street
New Orleans, Louisiana

Standard Distillers Products, Inc.
308-310 East Lombard Street
Baltimore 2, Maryland

- O. *Government Exhibit 14. Brief of the Distillers Company, Ltd., Filed January 4, 1957 with the Director, Alcohol and Tobacco Tax Division, Department of the Treasury Internal Revenue Service,*

In the Matter of Proposals to Amend Regulations No. 5 Relating to the Labeling and Advertising of Distilled Spirits, Hearings Held November 28 and December 5, 1956

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

IN THE MATTER OF PROPOSALS TO AMEND REGULATIONS
NO. 5 RELATING TO THE LABELING AND ADVERTISING
OF DISTILLED SPIRITS

Hearings held November 28 and December 5, 1956.

BRIEF OF THE DISTILLERS COMPANY, LIMITED.

FREDERIC P. LEE
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STerling 3-4858
*Attorney for The Distillers
Company, Ltd.*

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT.....	1
THE ACT AND REGULATIONS.....	2
POSITIONS TAKEN BY PARTIES.....	3
ARGUMENT.....	3
I. The References Proposed To Be Permitted Would Constitute Age Representations.....	3
II. The Proposed Age References Would Mislead the Consumer.....	4
A. The Evidence of Record Is That the References Would Be Misleading.....	4
B. The Government Has Held Such Age References Misleading.....	6
C. Neutral Spirits, Gin, and Vodka Do Not Improve in Quality by Storage in Wood..	7
III. The Present Regulation Should Not Be Changed in the Absence of Substantial Evi- dence of Record Supporting a Change.....	8
IV. Neutral Spirits, Gin, and Vodka Stored in Wood Are Outside the Standards of Identity for Such Products.....	12
CONCLUSION.....	14

* * * *

[1]

**DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE**

**IN THE MATTER OF PROPOSALS TO AMEND REGULATIONS
No. 5 RELATING TO THE LABELING AND ADVERTISING
OF DISTILLED SPIRITS**

Hearings held November 28 and December 5, 1956.

BRIEF OF THE DISTILLERS COMPANY, LIMITED.

PRELIMINARY STATEMENT

This Brief is submitted by The Distillers Company, Limited pursuant to leave granted by the Presiding Officer (Tr. 15).

The Distillers Company, Limited is a distiller with a registered distillery at Linden, New Jersey. The Company produces only gin and gin based cocktails. Among its brands are Gordon's Distilled London Dry Gin, Sir Robert Burnett and Company Distilled Dry Gin, Hills and Underwood Distilled Dry Gin, and Boord's Distilled Dry Gin.

This Brief relates to Proposals Nos. 24 and 30 which are as follows (21 F.R. 8321-8322):

"24. To amend section 39(e)(5) (27 CFR 5.39 (e)(5)) to permit truthful references of a general and informative nature relating to methods of production involving storage as to certain products, such as neutral spirits and gin, which are not entitled to bear

- [2] age statements, provided they have been stored in oak containers for some specified minimum period, e.g., three months.”

“30. To amend section 64 (c) (27 CFR 5.64 (c)) to permit truthful references of a general and informative nature relating to methods of production involving storage in advertisements for certain products, such as neutral spirits and gin, which are not entitled to bear age statements, provided they have been stored in oak containers for some specified minimum period, e.g., three months.”

THE ACT AND REGULATIONS

The Federal Alcohol Administration Act (27 USC § 205 (e) and (f)) authorizes the Secretary to prescribe regulations with respect to labeling and advertising of distilled spirits that will—

(a) “prohibit deception of the consumer with respect to such” distilled spirits; and

(b) “prohibit, irrespective of falsity, such statements relating to age, [and] manufacturing processes, . . . as the Secretary of the Treasury finds to be likely to mislead the consumer.”

The pertinent existing regulations under the Act provide (27 CFR § 5.39 (e) (5) and § 5.64 (c)) as follows:

“§ 5.39 (e) *Miscellaneous age representations.* . . .

“(5) . . . Age, maturity, or similar representations as to neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs, and bitters, are misleading, and shall not appear upon any label . . .”

“§ 5.64 (c) *Statements of age.* The advertisement shall not contain any statement, design, or device directly or by implication concerning age or maturity of any brand or lot of distilled spirits unless a statement of age appears on the label of the advertised product . . .”

[3] Adoption of Proposals 24 and 30 would repeal the above quoted provisions of the existing Regulations.

POSITIONS TAKEN BY PARTIES

Adoption of the proposals is opposed on the record by the Distilled Spirits Institute (Tr. 42-43, 46);¹ the League of Distilled Spirits Rectifiers, Inc. (Tr. 54-59); the National Association of Alcoholic Beverage Importers, Inc. (Tr. 97-99); The Distillers Company, Limited (Tr. 140-151); National Distillers Products Corporation (Letter of December 4, 1956); The Fleischman Distilling Corporation (Telegram of December 5, 1956); The Barton Distilling Corporation (Letter of December 6, 1956 and earlier telegram); and Schenley Industries, Inc. (Tr. 45 San Francisco).

Adoption of the proposals is supported on the record by Joseph E. Seagram & Sons, Inc. (Tr. 116-120); and if the amendments are made only prospective in application, by Continental Distilling Corporation (Tr. 135).

ARGUMENT

I.

The References Proposed to be Permitted Would Constitute Age Representations.

The proposals would permit "truthful references of a general and informative nature relating to methods of production involving storage" of any of the numerous products not now entitled to state age of which the most important are neutral spirits, gin, and vodka. Such references would include statements referring to the storage process as "mellowing", "softening", "velveting", "smoothing", or referring to the product as "mellowed in oak casks" or "stored in wood", and the like.

¹ "Tr.", unqualified, refers to transcript of the hearing held at Washington, D. C., November 28, 1956.

[4] That such statements would constitute "age, maturity, or similar representations" now prohibited by the regulations, is obvious for the following reasons:

1. Unless the contemplated "references" were "age, maturity, or similar representations", it would not be necessary to amend §§ 5.39 (e) (5) and 5.64 (c) of the Regulations.

2. The witnesses who testified on Proposals Nos. 24 and 30 treated the contemplated "references" as age representations (Tr. 43 Jones, 57 Simpich, 118 Lind, 142 Lee, telegram of December 5, 1952 Devlin, letter of December 4, 1956 Joyce). Indeed the only witness who testified in any detail in support of the proposals proceeded on the basis that the proposals would permit a "general reference to age" on the label and in advertising (Tr. 118 Lind).

3. The Treasury Department ruled as long ago as 1937 (F.A. 91, January 21, 1937, p. 23) that—

"Bottling dates, distilling dates and words such as 'Old' and 'Matured', etc. are representations denoting age or maturity . . .".

The Government should not now close its eyes to what everyone else can see clearly and what the Government itself at one time saw clearly, namely, that the only purpose of permitting references to storage in oak containers is to give the consumer the impression that the product through such storage has improved in quality.

II.

The Proposed Age References Would Mislead the Consumer.

A. The Evidence of Record Is That the References Would Be Misleading.

The witnesses who testified on the point, except witness Lind, were of the view that references to storage of neu-

tral spirits, gin, or vodka would mislead the consumer. [5] Jones stated (Tr. 43 corrected) "To the consumer, storage in wood is synonymous with age" and "we believe that the simple statement 'stored in wood' on the label of any product not entitled to claim age is deceptive in the extreme". Lourie stated (Tr. 98-99) "I think the consumer's reaction would be perhaps erroneous. Let's use a mild phrase. He might get the impression that there was a difference between a product made with so-called mature neutral spirits and one made with neutral spirits which have not been matured." Simpich stated (Tr. 58) that the references would result in "confusion to the consumer." Lee stated that (Tr. 149) "Adoption of these proposals would promote consumer deception, in our judgment, by misleading references to age and to manufacturing processes . . ." Joyce stated (Letter of December 5, 1956) "The proposals, if adopted, would lead the public to believe that a product which is prohibited from making a claim of age has been improved through a process of aging—a result which would not only confuse the public but deceive them in direct contravention of the basic statute . . .".

The only testimony to the contrary is that of Lind (Tr. 118). He said "I know it has been said that the truth can be deceptive. I am not prepared to believe that statement, but certainly it is not true in this case."

Congress itself recognized that a partial truth can be deceptive when in the Act Congress prohibited "*irrespective of falsity*" (emphasis supplied) such statements relating to age or manufacturing processes "as the Secretary of the Treasury finds to be likely to mislead the consumer."

The question is not whether making such a statement as "stored in wood" is truthful but whether the statement is made so as to tell the truth or so as to deceive the consumer. "But a half truth is often as deceptive as a false-

hood". *Andrew Jergens Co. v. Bonded Products Corp.*, 21 F. 2d 419, 425 (C.A. 2, 1927). Judge Rose stated the situation well when he said:

[6] "One who with intent to deceive tells what is true in a sense in which he knows it will not be understood, is not a whit better than he who affirms something he knows to be false in every aspect". *Watkins Co. v. The Hill Products Co.*, 9 T.M. Rep. 502, 504 (D.C., N.Y., 1919).

Here a statement of the entire truth would be "Stored in Wood But That Fact Is Irrelevant for the Product Is Not Improved in Quality by Such Storage",—placed conspicuously on the front label. Even so the statement would mislead or confuse the consumer.

B. The Government Has Held Such Age References Misleading.

The existing Regulation was adopted almost verbatim from FACA misbranding ruling No. 4 (A.M. 225, p. 9, Aug. 30, 1934) which stated—

"Age, maturity, or similar statements or representations as to neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs and bitters, are misleading and are prohibited."

Shortly thereafter (October 9, 1934, FACA misbranding ruling No. 57, AM 275, p. 9) the Administration explained the basis for the ruling. It said:

"In the opinion of the Administration, the distilled spirits specifically named in this ruling [No. 4], including vodka, are types of distilled spirits whose quality does not improve with aging; and the ruling in question was predicated upon the ground that, being meaningless, representations of age for these distilled spirits would be misleading to the consuming public."

Thereafter in 1936 the Secretary of the Treasury adopted present § 5.39(e) (5) of the present Regulations which reads:

“ . . . Age, maturity, or similar representations as to neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs, and bitters, are misleading, and shall not appear upon any label.”

A year later the Federal Alcohol Administration ruled (F.A. 91, January 21, 1937, p. 23) that representations of age or maturity are

“ . . . prohibited from appearing upon labels for neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs, and specialties due to the fact that they are considered *misleading* . . . ” (emphasis in original).

Clearly both the present record and the Government's own rulings demonstrate that storage and other maturity statements for neutral spirits, gin, vodka, and other distilled spirits not entitled to claim age on the label, are misleading to the consumer.

C. *Neutral Spirits, Gin, and Vodka Do Not Improve in Quality by Storage in Wood.*

The basis for the conclusion that age representations for neutral spirits, gin, and vodka are misleading is that the consumer associates such storage or aging with improvement in quality, and neutral spirits, gin, and vodka do not improve in quality by such storage.

The Government itself has ruled such products do not improve with aging. FACA misbranding ruling No. 57, AM 275, p. 9.

The testimony of record is to the same effect. Jones stated (Tr. 42) “no conclusive data is available that such products do age, or that they improve with storage in oak containers”. Lourie stated (Tr. 97) “as an ex-chemist”

I said I did not know "how you improved neutral spirits that are really neutral". Lee stated (Tr. 149) "you are being asked to adopt the proposal without any newly discovered facts or data that would justify a conclusion that placing such products as neutral spirits and gin in wood [8] improves their quality . . ." Joyce (Letter of Dec. 4, 1956) was of the same view.

The presiding officer was unwilling to place the Government's chief chemist on the stand at the hearing in Washington for oral questioning on the point (Tr. 151-152).

There is no evidence whatever in the record that neutral spirits, gin, or vodka, age or mature in the sense of improve in quality, by storage in wood, save Lind's pronouncement (Tr. 118)—

"We know, and most distillers know, that ageing in wood improves neutral spirits and gin. I am not a chemist, and in fact, I am not interested in the chemistry of whiskey. There is only one test in which I am interested, and that is the test of taste. I defy anyone to prove to me that ageing neutral spirits or gin in wood does not improve it."

Lind did not attempt to prove by evidence that neutral spirits and gin improve by storage in wood. He merely defied everyone else to disprove his assertion. The burden is on the proponents of the proposal, not others, and the absence not only of evidence, but even of any offer of evidence, to support the proposals is significant. Lind did not claim that proof existed, merely that "we know, and most distillers know". If he knew, why was he unwilling to place his knowledge of record by evidence? The conclusion must be that such evidence does not exist. This could have been brought out categorically were reasonable cross-examination of witnesses permitted at the hearing.

III.

**The Present Regulation Should Not Be Changed in the
Absence of Substantial Evidence of Record Sup-
porting a Change.**

The present regulation prohibiting as misleading age, maturity, or similar representations as to neutral spirits, gin, and vodka was adopted twenty years ago in 1936 after [9] appropriate statutory hearings. It has remained unchanged since. The consumer knows that age is not stated for neutral spirits, gin, and vodka even though he does not know the scientific and statutory basis for the prohibition of age statements for such products.

During this twenty year period the matter was reconsidered at length by the Secretary and the present regulation retained without change. This occurred eight years ago when in 1948 a proposal (13 F.R. 4927) was set for hearing as follows:

"10. To amend sections 39(d) and (e) (27 C.F.R. 5.39(d) and (e)), 64(c) (27 C.F.R. 64(c)) and other pertinent sections of the regulations so as to except from the prohibition against statements and representations relating to age in the case of neutral spirits, general and inconspicuous references of an informative nature, on back labels or in advertisements, to production methods involving 'mellowing', 'softening', 'velveting', or 'smoothing' neutral spirits through storage in oak cooperage for a period of not less than 6 months."

This 1948 proposal is practically the same as the present proposals except that the present proposals extend to gin, vodka, and other items, as well as neutral spirits, and would reduce the minimum storage period from six months to three months.

The transcript and exhibits of the 1948 hearing show that—

a. No industry member affirmatively supported the proposals.

b. The Distilled Spirits Institute, then as now, opposed the proposal. Mr. Jones stated that by its adoption no useful knowledge would be communicated to the purchasers and the adoption would result in competitive claims that would exaggerate the importance of a manufacturing process and confuse the purchasing public.

[10] c. The National Association of Alcoholic Beverage Importers, then as now, opposed the proposal. Mr. Lourie stated that the proposal was bound to cause trouble and would result in competitive labeling and advertising.

d. The American Distilling Company, while it neither opposed nor supported the proposal, stated that if the proposal were adopted it should include storage in ventilated metal tanks, as well as in oak barrels. Storage of neutral spirits in such tanks made a softer spirit than storage in oak barrels. Further, neutral spirits stored in reused whisky barrels take on a slight whisky character without noticeably softening the spirits themselves.

e. There was no evidence offered that neutral spirits improve by storage in wood.

The 1948 proposal was not adopted. Now again, after eight more years, the proposal is revived without any additional factual basis for its revival.

It is an imposition on both the Secretary and in industry again to set such a proposal for hearing when proponents are not in a position to offer evidence that neutral spirits, gin, and vodka do improve with storage in wood. It is an abuse by them of the administrative processes, an attempt to force a change on bases other than considerations legally appropriate.

Further, the Secretary is bound by the record. Joyce stated (letter of December 4, 1956) :

"We would like to renew our position, with which we are sure the Government is familiar, that in promulgating any regulations as a result of a notice and public hearings on a proposed change in regulations, the Government is bound by the testimony offered at the hearing and is not free to consider extraneous matters outside of the hearing of which those industry members attending the statutory 'public hearing' have no knowledge. . . ."

[11] Congress has required that regulations be adopted only after hearing (Act, 27 USC § 205). We submit that since the regulations have the force and affect of law, this means that regulations are to be prescribed only on the basis of the hearing and the record made at the hearing. Otherwise the hearing becomes a sham.

The presiding officer stated that any material and relevant testimony received would be made a part of the record and none would be accepted after close of the hearing on December 5 (Tr. 15). Interested parties may examine the record and submit briefs (21 F.R. 8321). It is implicit that such briefs are, therefore, to be based on the record. If the Secretary is to decide the question on facts outside the record and unknown to parties and their attorneys, briefs are futile. They become briefs based on only a part of the facts, not all the facts on which the decision is to be made. The Secretary should make his findings on the record, not make them on the basis of secret data or no data.

The Attorney General's Manual on the Administrative Procedure Act (1947) pp. 33-34 states—

"Statutes authorizing agencies to prescribe future rates (i.e., rules of either general or particular applicability) for public utilities and common carriers typically require that such rates be established only after an opportunity for a hearing before the agency. Such statutes rarely specify in terms that the agency

action must be taken on the basis of the 'record' developed in the hearing. However, where rates or prices are established by an agency after a hearing required by statute, the agencies themselves and the courts have long assumed that the agency's action must be based upon the evidence adduced at the hearing. . . .

"With respect to the types of rule making discussed above, the statutes not only specifically require the agencies to hold hearings but also, specifically, or by clear implication, or by established administrative and judicial construction, require such rules to be formulated upon the basis of the evidentiary record [12] made in the hearing. In these situations, the public rule making procedures required by section 4(b) will consist of a hearing conducted in accordance with sections 7 and 8."

This principle is not limited to rates or prices. It is applicable to all rule making where a hearing is prescribed by statute and the rule has the force and effect of law. On judicial review the administrative record should be received in evidence and the court's decision based thereon. Cf., *Shields v. Utah Idaho Central R. Co.*, 305 U.S. 177, 185 (1938); *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943); *Far East Conference v. United States*, 342 U.S. 570, 574-575 (1952). Implicit in such cases is the view that the administrative agency will base its decision on such record. The Court should determine the matter upon "a full record". *United States v. Chesapeake and O. R. Co.*, (U.S. Sup. Ct., Dec. 3, 1956) 1 L. ed. 2d 140, 143.

Here the hearing record is devoid of any facts that would be a basis for amending the existing regulation. That without more, should be the end of the matter.

IV.

Neutral Spirits, Gin, and Vodka Stored in Wood Are Outside the Standards of Identity for Such Products.

The proposals that labeling and advertising of neutral spirits, gin, and vodka may make reference to storage in wood implies that such products remain neutral spirits, gin, and vodka despite such storage. This is not a correct interpretation of the regulations.

All three products are basically *neutral* spirits. One is neutral spirits without any addition (27 CFR § 5.21(a)); the second, "gin", is neutral spirits with only the flavor from juniper berries and other aromatics added (27 CFR § 5.21(c)(1)); the third, "vodka", is neutral spirits further purified or refined (27 CFR § 5.21(a)(1)). Storage in wood, whether new or reused charred barrels, would [13] destroy the character of these products as neutral spirits or derivatives of neutral spirits. By such storage the spirits would cease to be neutral. The spirits would be changed even though not improved in quality. Spirits subjected to such storage absorb color and other extractives from the wood. On the other hand, neutral spirits do not contain substantial congeners from distillation that will mature through storage in wood. As a result of storage in wood neutral spirits, gin, and vodka will fall outside their standard of identity, and have to be sold under some fanciful name. Several witnesses made the point. (Tr. 57-58 Simpich; Tr. 147-148 Lee; Letter of December 4, 1956 Joyce; Letter of December 6, 1956, and earlier telegram Barton Distilling Co.).

The Government itself has already so ruled. Vodka that takes on color from storage in wood may not be labeled "vodka". C.B. 1955-2, 700, 735. Gin to be bottled in bond may be stored only in barrels "coated or lined with paraffine, or other substance, which will preclude contact of the spirits with wood surface and prevent ab-

sorption of wood color or flavoring". 26 CFR § 225.950. So-called "Golden Gin" is not gin under the standards of identity and certificates of label approval for it should be recalled.

So far as is known there has been no occasion to rule on neutral spirits stored in wood. Clearly they ceased to be neutral as soon as placed in container other than one of metal or, if of wood, one so coated or lined as to preclude contact with the wood surface.

Proposals 24 and 30 are wholly inconsistent with the present standards of identity. The notice of hearing (21 F.R. 8321) does not propose modification of these standards, and proposals Nos. 24 and 30 could not be placed in effect without a further notice and hearing on changes in the standards of identity for neutral spirits, gin, and vodka. (Joyce letter of December 4, 1956; Barton Distilling Co. letter of December 6, 1956, and earlier telegram.)

[14]

CONCLUSION

If age representations such as "mellowed" or "stored in wood" could be made for neutral spirits, gin, and vodka, on the assumption (clearly false) that such products mature or improve in wood, then there is no reason why the regulations should not be amended to permit age statements in regular form for such products. The present proposals are merely the initial step towards age statements for gin, vodka, and the neutral spirit content of blended whisky and spirit whisky.

Adoption of the proposals would promote consumer deception contrary to the Act, would reduce trade competition to the level of deceptive maturity claims devised for the purpose of increasing sales, and would give a discriminatory advantage to those who produce under distillers permits (Tr. 56-57, 149-150).

196 A

The existing regulations on the point have been in effect over 20 years. They were based on evidence that neutral spirits, gin, and vodka do not improve by storage in wood. They were not changed after hearings on a similar proposal in 1948. There is no evidence in the record of this hearing that supports any change.

The proposals should not be adopted.

Respectfully submitted,

FREDERIC P. LEE
1200 18th Street, N. W.
Washington 6, D. C.
STerling 3-4858

*Attorney for The Distillers
Company, Ltd.*

P. Government Exhibit No. 15. Letter Dated December 4, 1956, Submitted by the National Distillers Products Corporation to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, in Re the Public Hearings Held on Certain Proposals to Amend the FAA Regulations, As Set Out in the Notice of Hearings

NATIONAL DISTILLERS PRODUCTS CORPORATION
99 Park Avenue
New York 16, N. Y.

R. E. JOYCE
Vice President

December 4, 1956

Mr. Dwight E. Avis, Director
Alcohol and Tobacco Tax Division
Internal Revenue Service
U. S. Treasury Department
Washington 25, D. C.

Dear Mr. Avis:

This letter is sent to you with the request that it be included in the record of the public hearings held on certain proposals to amend the FAA Regulations, as set out in the notice of the hearings published in the Federal Register of October 31, 1956 (Volume 21; number 212; at page 8321 et seq.). This presentation is directed to proposals numbered 24 and 30, relating to statements proposed to be permitted "relating to methods of production involving storage as to certain products, such as neutral spirits and gin, which are not entitled to bear age statements".

Mr. Howard T. Jones, Executive Secretary of the Distilled Spirits Institute, presented the statement of the Institute as to each item proposed. In the course of the hearing he was interrogated as to the procedure of the Institute in arriving at the position of the Institute on

each proposal obviously with a view of determining the position of individual company members.

National Distillers is opposed to the adoption of proposals 24 and 30 and so voted at the DSI directors' meeting at the time the label proposals were considered. We thoroughly subscribe to the statement of the Institute as presented by Mr. Jones.

We are concerned here with a proposal to change a regulation which has been in effect for more than twenty years and was adopted in order to prevent deception of the public as directed by the statute. Modification of the existing regulations of such long standing should not be made unless very compelling reasons are advanced with assurance that deception of the public would not result. No such reasons or assurances were presented at the hearing. On the contrary, the evidence showed that under various sections of the present regulations as they have existed for years, the consuming public has come to understand that the aging or storage of distilled spirits in wood effects a change in the character and quality of the product which improves its acceptability by the public. The proposals, if adopted, would lead the public to believe that a product which is prohibited from making a claim of age has been improved through a process of aging—a result which would not only confuse the public but deceive them in direct contravention of the basic statute under which the regulation was issued.

If it should be argued that the retention of neutral spirits and gin in wooden containers for any length of time effects a change in the products, then the neutral quality of the products has been destroyed and they are no longer available under the present standards of identity for bottling as gin or for use as neutral spirits in the manufacture of blended whiskey. Such a condition would make necessary the creation of new standards of identity

for the products, a matter which was not included within /
the scope of the notice of hearing.

There was no factual evidence introduced at the hearing of November 28, 1956 bearing upon what if any change in the character of the products was effected by the retention for any period or periods of time in wood, and we are disappointed at the failure of the Government to place its chemist on the stand for interrogation as requested by industry representatives opposed to the suggested proposals.

We would like to renew our position, with which we are sure the Government is familiar, that in promulgating any regulations as a result of a notice and public hearings on a proposed change in regulations, the Government is bound by the testimony offered at the hearing and is not free to consider extraneous matters outside of the hearing of which those industry members attending the statutory "public hearing" have no knowledge. Those members of the industry testifying at the hearing submitted themselves for questioning and Government chemists possessed of knowledge pertinent to the questions raised in the notice of hearing should have done likewise.

We strongly disapprove the adoption of proposals 24 and 30 and strongly urge that they be not adopted.

Very truly yours,

/s/ R. E. Joyce
R. E. JOYCE
Vice President

200 A

Q. Government Exhibit 16. Telegram Sent by the Fleischman Distilling Corporation Dated December 4, 1963, to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, in Opposition to Proposals 24 and 30 Concerning Labeling and Advertising of Certain Products Such as Neutral Spirits and Gin

WNU002 DL PD

WUX NEW YORK NY DEC 4 438PME

DIRECTOR, ALCOHOL AND TOBACCO TAX DIVN

INTERNAL REVENUE SVC US TREASURY DEPT
THE FLEISCHMANN DISTILLING CORPORATION WISHES
TO REGISTER ITS OPPOSITION TO PROPOSALS 24 AND 30
CNCERNING LABELING AND ADVERTISING OF CERTAIN
PRODUCTS SUCH AS NEUTRAL SPIRITS AND GIN, WHICH
PROPOSALS WERE PUBLISHED IN THE FEDERAL REGIS-
TER OF OCTOBER 31, 1956. ALTHOUGH BOTH THE DISTILL-
ED SPIRITS INSTITUTE AND THE NATIONAL ASSOCIA-
TION OF ALCOHOL BEVERAGE IMPORTERS, OF WHICH
ASSOCIATIONS WE ARE MEMBERS, MADE STATEMENTS
AT THE HEARINGS IN WASHINGTON ON NOVEMBER 28
OPPOSING BOTH OF THESE PROPOSALS, THIS MATTER IS
OF SUCH VITAL IMPORTANCE THAT WE DEEM IT NECES-
SARY TO STATE OUR OPPOSITION SEPARATELY. TIME
DOES NOT PERMIT A DETAILED STATEMENT OF THE
REASONS FOR OUR OPPOSITION, BUT WE REFER TO THE
PRESENTATION MADE BY FREDERICK P LEE ON BEHALF
OF DISTILLERS COMPANY LIMITED AT THE NOVEMBER
28TH HEARING WHICH PRESENTATION WE ENDORSE
WHOLEHEARTEDLY

THE FLEISCHMAN DISTILLING CORP WALTER J. DEVLIN
VICE PRESIDENT

DEC 5 1231AME

24 30 31 1956.

R. Government Exhibit 17.

(A) Night Letter Telegram Sent by the Barton Distilling Company Dated December 4, 1963, to the Alcohol and Tobacco Tax Division, in Re the Hearing on Proposals to Amend Regulations No. 5 (27 CFR Part 5)

WESTERN UNION**TELEGRAM**

(43) . . .

OC004

1956 DEC 5 AM 7 01

0 CA067 NL PD=CHICAGO ILL DEC 4=

ALCOHOL AND TOBACCO TAX DIVN, HEARING ON PROPOSALS TO AMEND REGULATIONS NO 5 (27 CFR PART 5) ST FRANCIS HOTEL SFRAN=

LETTER PRESENTING SUMMARY OF OUR VIEWS CONCERNING PROPOSALS 3 15 16 18 25 30 AND 31 FORWARDED BY SPECIAL DELIVERY AIR MAIL TODAY.

¶ FIRST TWO ALTERNATIVES OF PROPOSAL 3 ELIMINATING THE CLASSES AND TYPES DESCRIBED WOULD DEPRIVE DISTILLER OF ABILITY TO ADVISE PUBLIC AT FIRST GLANCE THAT HIS PRODUCT CONTAINS MORE VALUABLE INGREDIENTS THAN ORDINARY BLENDED WHISKEY.

¶ PROPOSAL 15. LABEL AND ADVERTISING REGULATIONS ARE SOLELY INTENDED TO PROTECT AND INFORM THE CONSUMER BY ADVISING HIM AS TO TRUE CONTENTS AGE AND STATE OF DISTILLATION OF HIS WHISKEY PURCHASES. ELIMINATING THE REQUIREMENT THAT THE STATE OF DISTILLATION APPEAR ON SEPARATE LINE ON GOVERNMENT LABEL CAN ONLY BE INTENDED TO HIDE THE FACT THAT THE WHISKEY WAS NOT PRODUCED IN ONE OF THE CONSUMER PREFERRED STATES AS KENTUCKY. PROPOSAL 16. PROTECTION OF AND INFORMATION FOR THE PUBLIC THROUGH LABEL AND ADVERTISING REGULATIONS OF PARAMOUNT IMPORTANCE. WE DO NOT OBJECT TO HAVING AMENDMENT APPLY TO SPIRITS BOTTLED BY DISTILLER BUT WE STRENUOUSLY OBJECT TO HAVING AMENDMENT APPLY TO SPIRITS BOTTLED QUOTE FOR UNQUOTE THE DIS-

TILLER. BOTTLER HAVING FACILITIES IN AND OUT OF KENTUCKY COULD SHOW ON THE SIGNATURE BOTH ADDRESSES CREATING FALSE IMPRESSION THAT NON-KENTUCKY WHISKEY BOTTLED IN KENTUCKY HAD ALSO BEEN DISTILLED IN KENTUCKY.

¶ PROPOSALS 18 AND 31 SHOULD BE CONSIDERED TOGETHER. CONSUMING PUBLIC FAMILIAR WITH PINTS AND QUARTS BUT NOT WITH FLUID OUNCES.

¶ PROPOSAL 25. DELETION OF PROVISIO AT END OF SECTION WOULD PERMIT MAKING OF UNVERIFIED CLAIMS.

¶ PROPOSAL 30. TO PERMIT REFERENCE TO STORAGE IN RE-USED OAK CONTAINERS FOR LESS THAN SEVERAL YEARS WOULD BE MISLEADING SINCE SHORTER STORAGE PERIODS WOULD NOT IMPROVE QUALITY OF PRODUCT. STORAGE IN NEW CONTAINERS FOR SHORTER PERIODS WOULD IMPROVE QUALITY BUT WOULD AT SAME TIME CHANGE STANDARD OF IDENTITY.

¶ REQUEST PERMISSION TO SUBMIT WRITTEN BRIEFS=
BARTON DISTILLING CO OSCAR GETZ PRES=

203 A

(B) *Follow-up Letter (with Enclosures) Sent by the Barton Distilling Company, Dated December 4, 1956, to the Alcohol and Tobacco Tax Division, in Re Hearing on Proposals to Amend Regulations No. 5 (27 CFR Part 5)*

BARTON DISTILLING COMPANY

Bardstown, Nelson County, Kentucky—Since 1879

Office of the President

December 4, 1956

Alcohol and Tobacco Tax Division
Hearing on Proposals to Amend
Regulations No. 5 (27 CFR Part 5)
St. Francis Hotel
San Francisco, California

Gentlemen:

With further reference to our night letter, a copy of which is attached, we desire to present to the hearing on the proposals to amend Regulations 5 (27 CFR Part 5) our views with regard to proposals 3, 15, 16 18, 25, 30 and 31.

Summaries in duplicate of these views are attached.

We request the right to submit, within such reasonable time as you may designate, briefs in support of our views.

Very truly yours,

BARTON DISTILLING COMPANY

/s/ Oscar Getz
OSCAR GETZ
President

OG:pc
Enc.

NIGHT LETTER

Alcohol and Tobacco Tax Division
Hearing on Proposals to Amend Regulations No. 5
(27 CFR Part 5)
St. Francis Hotel
San Francisco, California

Letter presenting summary of our views concerning proposals 3, 15, 16, 18, 25, 30 and 31 forwarded by special delivery air mail today.

First two alternatives of proposal 3 eliminating the classes and types described would deprive distiller of ability to advise public at first glance that his product contains more valuable ingredients than ordinary blended whiskey.

Proposal 15. Label and advertising regulations are solely intended to protect and inform the consumer by advising him as to true contents, age and state of distillation of his whiskey purchases. Eliminating the requirement that the state of distillation appear on separate line on Government label can only be intended to hide the fact that the whiskey was not produced in one of the consumer-preferred states, as Kentucky.

Proposal 16. Protection of and information for the public through label and advertising regulations of paramount importance. We do not object to having amendment apply to spirits bottled by distiller but we strenuously object to having amendment apply to spirits bottled quote for unquote the distiller. Bottler having facilities in and out of Kentucky could show on the signature both addresses creating false impression that non-Kentucky whiskey bottled in Kentucky had also been distilled in Kentucky.

Proposals 18 and 31 should be considered together. Consuming public familiar with pints and quarts but not with fluid ounces.

205 A

Proposal 25. Deletion of proviso at end of section would permit making of unverified claims.

Proposal 30. To permit reference to storage in re-used oak container for less than several years would be misleading since shorter storage periods would not improve quality of product. Storage in new containers for shorter periods would improve quality but would at same time change standard of identity.

Request permission to submit written briefs.

Barton Distilling Company
Oscar Getz, President

Barton Distilling Company
134 North LaSalle St.
Chicago 2, Illinois.

206 A

BARTON DISTILLING COMPANY

No. 30

The proposed amendment does not state whether the oak containers in which the neutral spirits or gin would be stored would be required to be new or could be re-used containers. Storage in re-used containers would not improve the quality of the neutral spirits or gin unless stored in such re-used containers for several years. To permit reference to storage in re-used containers for shorter periods would be misleading.

On the other hand, storage in new containers would change the standard of identity as defined in section 21(a) (27 CFR 5.27(a)) which clearly defines neutral spirits or alcohol "as to lack the taste and aroma and other characteristics of whiskies, brandy, rum or other potable beverage spirits".



676
BRIEF FOR APPELLANT

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,465

JOSEPH E. SEAGRAM & SONS, INC.,

Appellant,

v.

HONORABLE DOUGLAS DILLON, et al.,

Appellees

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA**

**EDMUND L. JONES
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Of Counsel

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New York, N. Y. 10006

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 13 1964

Nathan J. Paulson

Statement of Question Presented.

Did the District Judge err in striking appellant's affidavits submitted in opposition to appellees' motions for summary judgment and in granting summary judgment in an action to set aside the denial of appellant's application for a Certificate of Label Approval for its new blended whiskey, Calvert Extra, upon the basis of a regulation issued pursuant to the Federal Alcohol Administration Act when:

1. The Act empowered appellees to make regulations solely to prevent deceptive and misleading statements and to require the making of informative statements on labels for alcoholic beverages; and
2. The complaint alleged and appellant's uncontroverted affidavits established, that the statements which appellant proposed to make on its label were true, not misleading and informative; and
3. There was no provision for or hearing before appellees to determine whether the proposed statements were in fact true, not misleading and informative; and
4. Appellees relied on exhibits which related solely to the promulgation of and proposed changes in the regulation, all of which antedated the production of Calvert Extra and none of which contained any facts or findings concerning it?

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 18,465

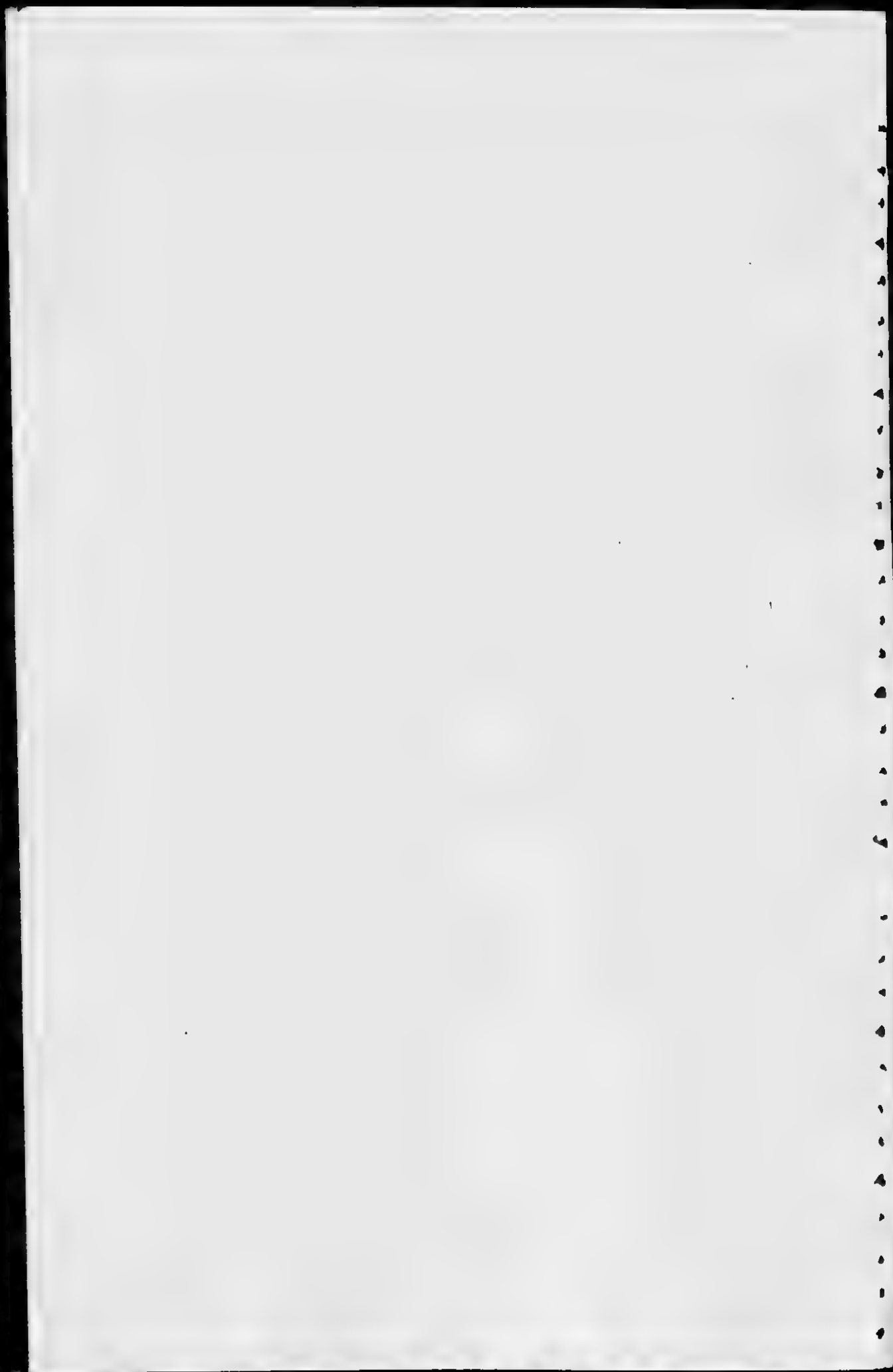
JOSEPH E. SEAGRAM & SONS, INC.,

Appellant,

v.

HON. DOUGLAS DILLON, HON. MORTIMER M. CAPLIN, HON.
DONALD W. BACON, HON. DWIGHT E. AVIS, NATIONAL DIS-
TILLERS AND CHEMICAL CORPORATION, SCHENLEY INDUS-
TRIES, INC., STITZEL-WELLER DISTILLERY, INC.,

Appellees.



Index and Table of Authorities.

	PAGE
Jurisdictional Statement	1
Statement of the Case.....	2
A. The Complaint	2
B. Appellees' and Intervenor's motions to dis- miss and for Summary Judgment.....	5
Constitutional Amendment, Statute and Regulation Involved	9
Statement of Points.....	10
Summary of Argument.....	10
Argument:	
I. The District Court erred in striking Appel- lant's affidavits and granting summary judgment	11
II. The District Court denied Appellant due process in failing to grant it an evidentiary hearing	24
III. The exhibits submitted by Appellees do not support the action of the District Court.....	26
Conclusion	28
Appendix	31

Table of Authorities.

CASES.	PAGE
<i>Addison v. Holly Hill Fruit Products Co.</i> , 322 U. S. 607 (1944)	18
* <i>Armour & Co. v. Freeman</i> , 113 U. S. App. D. C. 37, 304 F. 2d 404, cert. denied, 370 U. S. 920 (1962)....	17
<i>Bowles v. Willingham</i> , 321 U. S. 503 (1944).....	24
<i>Brannan v. Stark</i> , 342 U. S. 451 (1952).....	19
* <i>Continental Distilling Corp. v. Humphrey</i> , 95 U. S. App. D. C. 104, 220 F. 2d 367 (1954).....	12, 26
* <i>Continental Distilling Corp. v. Humphrey</i> , 101 U. S. App. D. C. 210, 247 F. 2d 796 (1957).....	15, 16, 18
<i>Denver Stock Yard v. Livestock Assn.</i> , 356 U. S. 282 (1958)	19
<i>Ewing v. Mytinger & Casselberry, Inc.</i> , 339 U. S. 594 (1950)	24
<i>Ex Parte Endo</i> , 323 U. S. 283 (1944).....	12
<i>F. C. C. v. American Broadcasting Co.</i> , 347 U. S. 284 (1954)	19
* <i>Friend v. Lee</i> , 95 U. S. App. D. C. 224, 221 F. 2d 96 (1955)	16, 18, 26
* <i>Functional Music, Inc. v. F. C. C.</i> , 107 U. S. App. D. C. 34, 274 F. 2d 543 (1958), cert. denied, 361 U. S. 813 (1959).....	22
<i>Gibson Wine Co. v. Snyder</i> , 90 U. S. App. D. C. 135, 194 F. 2d 329 (1952).....	26
<i>Helvering v. Credit Alliance Co.</i> , 316 U. S. 107 (1942)	19
<i>M. Kraus & Bros. v. United States</i> , 327 U. S. 614 (1946)	12
<i>Morrill v. Jones</i> , 106 U. S. 466 (1883).....	19

* Cases chiefly relied upon.

	PAGE
<i>National Broadcasting Co. v. United States</i> , 319 U. S. 190 (1943).....	19, 20, 21
<i>Ohio Bell Telephone Co. v. Comm.</i> , 301 U. S. 292 (1937)	24
<i>Social Security Board v. Nierotko</i> , 327 U. S. 358 (1946)	18
<i>Tucker v. Alexander</i> , 275 U. S. 288 (1927).....	12
<i>United States v. Carroll</i> , 345 U. S. 457 (1953).....	12
<i>Yakus v. United States</i> , 321 U. S. 414 (1944).....	24

STATUTES.

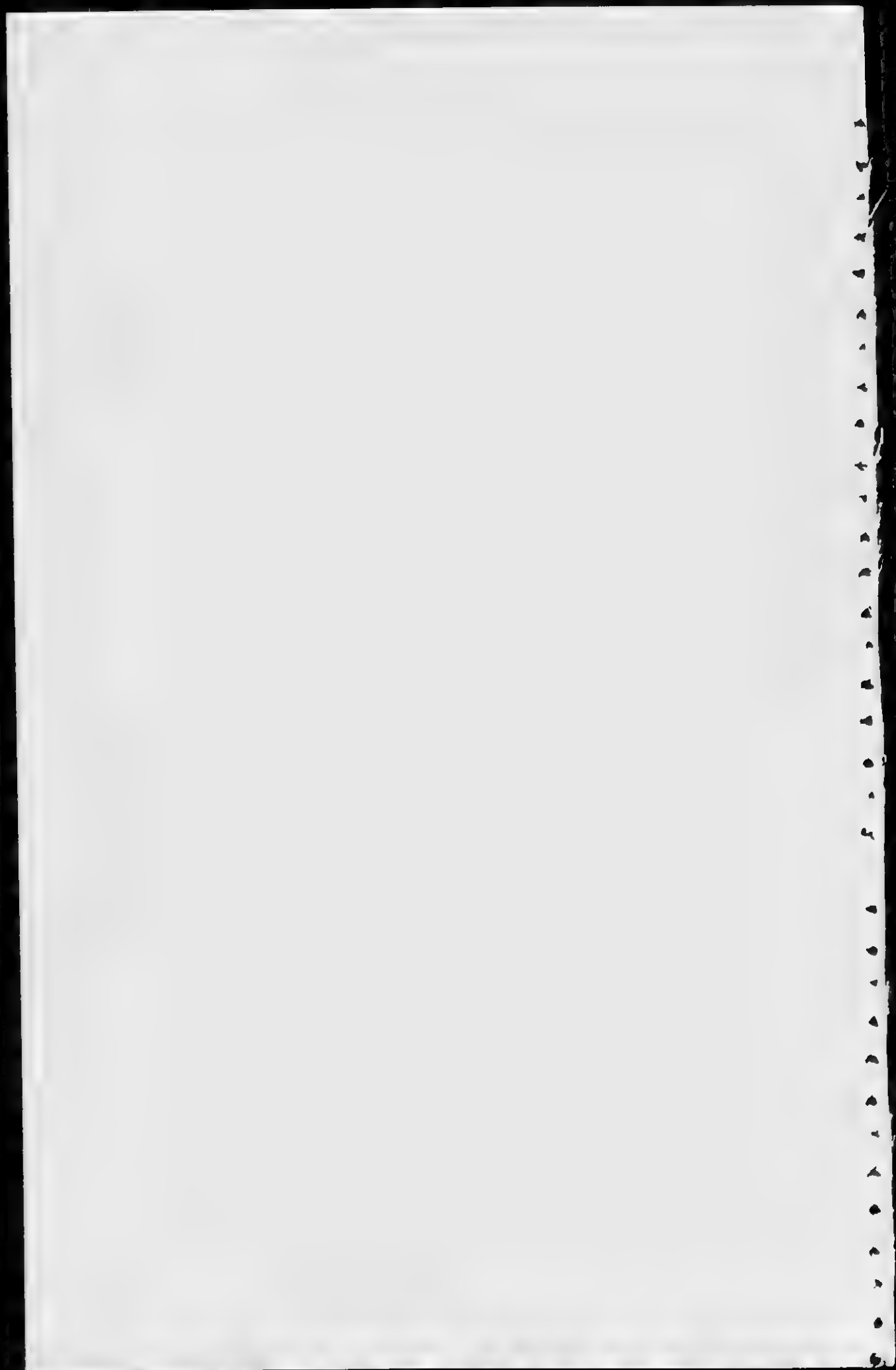
Federal Alcohol Administration Act (27 U. S. C. §§201-212)	2
Section 4 of the Act (27 U. S. C. §204).....	24, 25
Section 5(e) of the Act (27 U. S. C. §205(e))..	2, 3, 4, 9, 11, 25, 26

REGULATIONS.

27 C. F. R. §5.21(a) (1961).....	6
27 C. F. R. §5.10(j) (1961).....	12
27 C. F. R. §5.39(d) (1961).....	2, 5, 9, 11, 12

MISCELLANEOUS.

H. R. Rep. No. 1542, 75th Cong., 1st Sess. 9 (1935)	24
<i>Attorney General's Manual on the Administrative Procedure Act</i> (1947), p. 5.....	21
<i>Final Report of the Attorney General's Committee on Administrative Procedure</i> , S. Doc. 8, 77th Cong., 1st Sess. (1941).....	21



IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,465

JOSEPH E. SEAGRAM & SONS, INC.,
Appellant,

v.

HONORABLE DOUGLAS DILLON, *et al.*,
Appellees.

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA.*

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia had jurisdiction pursuant to the provisions of 27 U. S. C. §205(e); 28 U. S. C. §§1331, 1332, 1651, 2201; and 11 D. C. Code (1961 Ed.) §§305 and 306 (J.A. 7). In substance, the complaint sought a decree setting aside appellees' denial of an application for a certificate of label approval for appellant's new blended whiskey Calvert Extra (J.A. 14). The District Court granted appellees' motion to strike affidavits submitted by appellant in opposition to appellees' motions for summary judgment, granted the motions for summary judgment and dismissed the action on January 2, 1964 (J.A. 91). Notice of Appeal was filed on January 17, 1964 (J.A. 92). This Court has jurisdiction pursuant to 28 U. S. C. §§1291, 1294.

STATEMENT OF THE CASE.

Appellant, Joseph E. Seagram & Sons, Inc. is a distiller of alcoholic beverages, including blended whiskey (J.A. 7). Appellee Dillon is the Secretary of Treasury and appellees Caplin, Bacon and Avis are certain of his subordinates (hereinafter "appellees") who have responsibility for administering the Federal Alcohol Administration Act (27 U. S. C. §§201-212) (hereinafter the Act) (J.A. 7).

Appellees National Distillers and Chemical Corp., Schenley Industries, Inc., and Stitzel-Weller Distillery, Inc., are three of Seagram's competitors (hereinafter "intervenor"), who were permitted to intervene over appellant's objection by the district court.

On January 28, 1963, Seagram, as required by the Act, filed an application for a Certificate of Label Approval for a set of labels for Calvert Extra, a new blended whiskey to be marketed by its division, the Calvert Distilling Co. (J.A. 22-24). The Director of the Alcohol and Tobacco Tax Division (appellee Avis), without a hearing of any kind,¹ summarily denied the Label Certificate Application as contrary to one of the regulations issued under the Act (27 C. F. R. §5.39(d)).

Pursuant to Section 5(e) of the Act (27 U. S. C. §205(e)), which provides in part that the District Court shall have jurisdiction to annul, enjoin or suspend any final action upon an application for label approval, Seagram filed this action in the District Court (J.A. 1, 6-15).

A. The Complaint.

The complaint alleged that appellant "devoted years of effort and expended large sums² of money in the preparation of . . . specially distilled and stored grain neutral spirits" (J.A. 14) which after storage for more than four years (J.A. 8) it then blended with fine aged whiskies to form a new blended whiskey, Calvert Extra.

¹ The Act and the regulations issued thereunder do not provide for a hearing.

² More than \$8,000,000 (J.A. 70).

The complaint alleged that "the storage of plaintiff's especially distilled grain neutral spirits in specially selected used cooperage . . . does, in fact, improve the aroma, taste, quality and other characteristics of such grain neutral spirits" (J.A. 13).

When appellant sought to state these true and material facts on its label it was prevented by the Director (J.A. 21). The proposed label to be placed on the back of the bottles of Calvert Extra (with the disapproved portions italicized) read as follows:

"Calvert Extra was begun years ago when these spirits and whiskies were put aside. The grain neutral spirits in this product contribute a unique delightful taste of their own, the result of a special distillation process and of storage for at least four years in specially selected used cooperage—barrels which were previously used for aging our fine whiskies" (J.A. 24).

The complaint alleged that *"Each and every statement made on the back label . . . is in all respects true and is in no way misleading to the consumer of the alcoholic beverage"* (J.A. 12).

Nevertheless the Director ordered that the italicized portion of the label

" . . . must be deleted to conform with the distilled spirits labeling regulations (27 CFR 5.39 (d)). This section provides 'Age, maturity, or similar statements or representations as to neutral spirits . . . are misleading and are prohibited from being stated on any label'" (J.A. 21-22; Emphasis added.)

The complaint alleged that the proposed label should have been approved because it was neither false nor misleading but rather true and informative and therefore fulfilled the statutory requirements (27 U. S. C. §205(e)) for a label (J.A. 12).

The complaint alleged that appellees' promulgation and application of a regulation resulting in the disapproval of appellees' true, not misleading and informative label was

arbitrary and capricious in light of the statutory purpose of preventing deceptive, and requiring informative, labels (J.A. 13).

The regulation relied on by appellees was promulgated in 1936 by one of appellees' predecessors pursuant to §5(e) of the Federal Alcohol Administration Act (27 U. S. C. §205(e)) which empowered him to prescribe regulations with respect to the labeling of distilled spirits:

“(1) as will prohibit deception of the consumer with respect to such products . . . and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes . . . as the Secretary of the Treasury finds to be likely to mislead the consumer; (2) as will provide the consumer with adequate information as to the identity and quality of the products. . . .”

The statutory authority relates solely to the promulgation of regulations which will prevent statements on labels which are found “likely to mislead the consumer” and which will require statements informing the consumer as to “the identity and quality of the products.” If the instant label was true, not misleading and informative it was lawful under the statute and could not, as a matter of law, be prohibited by appellees.

There was no hearing before the agency with reference to appellant's application for label approval and therefore no finding by it that this label on this whiskey was misleading and not informative. Indeed, the statute does not provide for any such hearing on individual applications for label approval. Rather the statute provides that the “District Courts . . . shall have jurisdiction of suits to enjoin, annul, or suspend in whole or in part any final action by the Secretary upon any application under this subsection.” 27 U. S. C. §205(e). Appellees' decision denying the application for label approval was concededly a final action.

**B. Appellees' and Intervenor's Motions to Dismiss
and for Summary Judgment.**

No answers were ever filed. (See Docket Entries, J.A. 1 to 5). Instead appellees and intervenors filed motions to dismiss and alternative motions for summary judgment (J.A. 16, 56). No affidavits were submitted in support of any of these motions so the facts as alleged by Seagram were uncontradicted. In their memoranda in support of their motions to dismiss and for summary judgment, appellees and intervenor relied exclusively on the regulation (27 C. F. R. §5.39(d)), which was promulgated in 1936. They evidently contended that even if Seagram's label was true, informative and not misleading, as alleged in the complaint, the appellees could lawfully disapprove it on the basis of the 1936 regulation.

In support of the motion for summary judgment appellees submitted seventeen "exhibits", which they described as being "certified records of the Treasury Department" allegedly "relating to this matter" (J.A. 16 *et seq.*). Aside from copies of appellant's applications for label approval and appellees' formal rulings thereon, all of the "exhibits" related to the regulation promulgated by appellees. These exhibits consisted of excerpts from documents in the files of the Treasury Department and were in the nature of a legislative history of the regulation in question. No affidavit was submitted that this was the complete history of the regulation and in fact the crucial 1935 hearing transcript which preceded the promulgation of the regulation in 1936 was not even submitted. (See list of Exhibits, J.A. 16-18). The only exhibit that purported to explain the conclusion in the regulation that "'Age' statements . . . as to neutral spirits . . . are misleading" was Exhibit 8, a letter of October 9, 1934, from the General Counsel's Office of the Federal Alcohol Control Administration under the N. R. A., which antedated the regulation and stated in part:

"In the opinion of the administration, the distilled spirits specifically named in this ruling [including grain neutral spirits] . . . are types of distilled spirits *whose quality does not improve with aging*;

and the ruling in question was predicated upon the ground that, being meaningless, representations of age for these distilled spirits would be misleading to the consuming public." (J.A. 50; Emphasis added.)

Appellees did not submit a statement of material facts as to which they claimed there was no genuine issue, as required by Rule 9(h) of the District Court Rules, but purported to adopt "the facts as set forth in their memorandum of points and authorities" (J.A. 20). The intervenors filed a similar motion to dismiss or for summary judgment, which incorporated appellees' exhibits, but raised no new points. Intervenors did not file any affidavits in support of their motions.

Appellant served Notices to take the depositions of intervenors and of Dr. Alex P. Mathers, Chief, National Office Laboratory, Alcohol and Tobacco Tax Division, Internal Revenue Service (J.A. 2-3), to assist in deciding the motion for summary judgment, but these depositions were stayed on motion of appellees who contended that the District Court was limited to reviewing the "record" of the hearings before the agency prior to the promulgation of the regulation (J.A. 61, 63). While the only agency record relating to the label or the whiskey in question was the printed form of application for label approval and the denial by the agency, appellees contended that the "record" consisted of the "exhibits" they submitted (J.A. 2-30).

Appellant submitted affidavits (J.A. 63-78) in opposition to the motions of the appellees and intervenors. These affidavits, which were uncontroverted, established the following facts.

Approximately 65% of blended whiskey consists of grain neutral spirits, which are defined as spirits distilled from grain at or above 190° proof,³ whether or not such proof is subsequently reduced (27 C. F. R. §5.21(a) (1961)) (J.A. 72).

³ "Proof" is alcoholic content. The proof of ethyl alcohol in distilled spirits is stated at twice the percentage of such alcohol by volume at a temperature of 60° F. For example distilled spirits with 95% alcohol would be 190° proof.

Neutral spirits, however, are not "neutral" in that their taste, odor and color may vary greatly depending upon method of distillation and storage (J.A. 71). Because neutral spirits constitute such a large part of the final whiskey, the importance of improving their odor and flavor and mellowing them is great (J.A. 72). Actual samples were submitted to the District Court and are before this Court on appeal (J.A. 71, Exh. F and G). These two samples are both neutral spirits within the government definition, yet they have distinctly different taste and odor characteristics (J.A. 71-72).

In the 1930's it was believed that the best neutral spirits for blending were those which were as "neutral" as possible. However, in the early 1950's Seagram became increasingly aware of the possibility of improving neutral spirits by storage in reused cooperage. Since the chief difference between neutral spirits and whiskey is the proof at which they are distilled, there is no logical reason why neutral spirits (made of the same raw material as whiskey) should not improve by storage in much the same way as whiskey (J.A. 73). After extensive sampling and testing (at a cost of almost \$500,000 (J.A. 68)) Seagram developed a special distillate of neutral spirits which developed highly desirable taste and odor characteristics and became mellow and softer after storage for a period of years in reused oak barrels (J.A. 74—Exh. H).

After these specially distilled spirits were manufactured they were put in barrels for storage, rather than in huge vats in which it is customary to keep neutral spirits (J.A. 68). It was not until 1958 (two years after the most recent hearings referred to in appellees' "exhibits") that Seagram began to set aside large quantities of these spirits pursuant to a plan to produce and market a new blended whiskey in 1962 (J.A. 68). Seagram incurred additional expenses of a million and a half dollars as a result of using these barrels (J.A. 68). Then it had to acquire additional warehouse space; the additional expenses attendant upon storage of these neutral spirits for four years amounted to an additional five and a half

million dollars (J.A. 68-69). There is evaporation and leakage during the four years of storage which cost Seagram an additional \$760,000 (J.A. 69).

After the stored spirits were blended with Calvert's fine whiskies, the resultant blended whiskey, Calvert Extra, was finer, more flavorful and smoother than it would have been had the neutral spirits used in it not been stored for a four year period in reused cooperage (J.A. 69, 75, 78).

Submitted in connection with the motion for summary judgment and before this Court on appeal are actual samples of Seagram's specially distilled neutral spirits before and after storage (Exh. H & I, J.A. 74). These samples are striking proof that these neutral spirits did in fact improve and mellow as a result of storage for four years in reused cooperage.

Defendant also submitted the affidavit of its Director of Research who has a Ph.D. in Bacteriology and Bio-Chemistry (J.A. 76). He outlined the chemical reasons for the significant differences in taste and odor and the mellowing due to storage and concluded that there was a "highly significant change in the chemical composition of the specially distilled neutral spirits used in Calvert Extra by storage for four years in re-used cooperage which has a decided and beneficial effect on the taste and odor of such spirits" (J.A. 78).

Appellees filed a motion to strike the affidavits and exhibits submitted by appellant contending that the Court was limited to considering the so-called administrative record consisting almost entirely of excerpts from hearings conducted after the regulation had been promulgated and before the production and storage of the neutral spirits in question. No contention was made that there was any administrative record with reference to whether appellant's neutral spirits had in fact improved by storage for more than four years or whether appellant's label was false and misleading.

Pursuant to Rule 9(h) of the District Court, appellant filed a Statement of Genuine Issues Necessary to be Liti-

gated. Appellant maintained that summary judgment was improper since it was necessary for the Court to determine whether the statements on its proposed label were false or misleading as contended by appellees and intervenors, or true, not misleading and informative as contended by appellant (J.A. 79). The resolution of these issues depended upon a finding as to whether the neutral spirits used in Calvert Extra had in fact improved by storage for more than four years in reused cooperage.⁴ Appellant also specifically objected to the fact that appellees had not filed a statement as required by Rule 9(h) of the District Court (J.A. 79), and controverted ten "facts" alleged in appellees' Memorandum of Points and Authorities.

The District Court, without stating any reasons for its determination or citing any authorities, granted appellees' motion to strike appellant's affidavits and exhibits, and granted the motions for summary judgment (J.A. 90). This was done despite the fact that Seagram had never been afforded any hearing at which it could establish that the statements on its proposed label for Calvert Extra were true and not misleading, and in conformity with the statutory requirements of the Act.

CONSTITUTIONAL AMENDMENT, STATUTE AND REGULATION INVOLVED.

The Fifth Amendment to the United States Constitution and Section 5 of the Federal Alcoholic Administration Act of August 29, 1935, 49 Stat. 981 (1935) as amended, 27 U. S. C. §205 (1959), and the relevant regulation thereunder, 27 C. F. R. §5.39(d) (1961), are set forth in the Appendix to this brief.

⁴ By striking appellant's affidavits the District Court held that these issues were irrelevant to the proper disposition of this case.

STATEMENT OF POINTS.

1. The District Court erred in granting the defendants' and intervenors' motions for summary judgment, in declaring all other matters in the case moot, and in dismissing the action.

2. The District Court erred in granting the defendants' motion to strike plaintiff's affidavits and attached exhibits, which were submitted in support of plaintiff's opposition to the motions for summary judgment.

3. The District Court erred in denying the plaintiff the right to engage in discovery by way of depositions in order to obtain information to oppose the motions for summary judgment and to demonstrate the existence of genuine issues of material fact.

4. The District Court erred in considering and basing its decision on unsworn documents submitted by the defendants as exhibits in support of their motion for summary judgment and in completely ignoring the "Plaintiff's Statement of Genuine Issues Necessary To Be Litigated" filed pursuant to Rule 9(h) of the District Court.

SUMMARY OF ARGUMENT.

Appellant filed an Application for a Certificate of Label Approval with appellees for a label to be used on its new blended whiskey, Calvert Extra. In substance, the proposed label recited that the neutral spirits used in Calvert Extra contributed a unique and delightful taste of their own, the result of a special distillation process and of storage "for at least four years in specially selected used cooperage—barrels which were previously used for aging our fine whiskies."

Appellees did not object to the statement that the neutral spirits contributed a unique and delightful taste of their own but prohibited appellant from stating that it was

the result of storage for at least four years in reused cooperage, and denied the application for a certificate of label approval. No hearing was held to determine whether the proposed statement was true, not misleading and informative, either before the appellees or the District Court.

The Statute under which appellees purported to act empowered them to prescribe regulations "as will prohibit * * * statements as to age * * * likely to mislead the consumer" and to require statements which will "provide the consumer with adequate information about the identity and quality of the product." 27 U. S. C. §205(e).

A regulation promulgated by appellees prohibited statements with reference to age as to neutral spirits. (27 C. F. R. §5.39(d)). While appellant does not concede that its proposed statements were statements as to age, it maintains that even if they were, it is arbitrary, capricious and unlawful for appellees to promulgate and apply a regulation which, in this case, prohibits the making of true, not misleading and informative statements on a label. The promulgation and application of the regulation in this case is inconsistent with the statutory purpose and should be set aside.

The District Court erred in granting motions for summary judgment and in holding that even if the proposed statements were true, not misleading and informative as alleged, appellees acted lawfully in prohibiting the making of such statements.

A R G U M E N T .

I .

The District Court erred in striking Appellant's affidavits and granting summary judgment.

The applicable statute (27 U. S. C. §205(e)) is clearly intended to prevent consumer deception by forbidding statements on labels which are false or misleading and by requiring informative statements to be made. Neither

appellees nor intervenors submitted any proof with reference to appellant's neutral spirits and both chose to rely solely on the regulation. Thus their position was that even if the statements in question were true, informative and not misleading, it was lawful to prohibit them. This position was evidently adopted by the District Court. Certainly the legislative hearings after the promulgation of the regulation and prior to the setting aside of the spirits in question, with reference to neutral spirits in the abstract, upon which appellees relied, and which did not and could not have pertained to the particular neutral spirits used in Calvert Extra, or to storage for four years, are not a basis for a factual finding in this case.

The question then is whether the promulgation and application of a regulation which by its terms⁵ appears to require a result in this case which is directly contrary to the statutory purpose is lawful.

This Court has repeatedly held that it is not. Its decision in *Continental Distilling Corp. v. Humphrey*, 95 U. S. App. D. C. 104, 220 F. 2d 367 (1954), is the only decision under the instant statute in which the question was raised and decided.

In *Continental* the agency ordered Continental to state on its label for Embassy Club whiskey that it had been stored in reused cooperage. In so doing it applied a regu-

⁵ The District Judge held that appellant's statement that its specially distilled neutral spirits had been stored in reused cooperage for over four years was a statement as to "age" within the meaning of 27 C. F. R. §5.39(d) and the definition of "age" at 27 C. F. R. §5.10(j). Appellant contends that this definition of "age" does not apply to neutral spirits and that all that is prohibited under the regulation is a statement that "neutral spirits are years old" and that in stating that its specially distilled neutral spirits were stored for four years in reused cooperage, it has not made such a statement. Appellant maintains that this interpretation of the regulations is necessary to make them consistent with the statutory purpose. See *United States v. Carroll*, 345 U. S. 457 (1953); *M. Kraus & Bros. v. United States*, 327 U. S. 614 (1946); *Ex Parte Endo*, 323 U. S. 283 (1944); *Tucker v. Alexander*, 275 U. S. 228 (1927), all holding that a regulation should be interpreted, where possible, to accord with the statutory purpose.

lation which required such a statement on certain classes of whiskey as defined in the regulations. It was conceded that Embassy Club came within that class of whiskey and therefore that the regulation by its terms applied (*Id.* at 107 n. 3, 220 F. 2d at 370 n. 3). Although Embassy Club had been stored in reused cooperage Continental did not want to so state but wanted to state merely "This whiskey is 6 years old".

This Court summarized the position of Continental as follows:

"Continental also contends that the application to it of the reused cooperage regulations is not within the purposes of the Act to prevent consumer deception as set forth in §205(e), *supra*, and constitutes discriminatory treatment of an arbitrary and capricious character without rational relation to those purposes. . . . It alleges that the regulation so interpreted has no rational relation to the statutory purpose "of preventing, *inter alia*, deception as to quality"; that the whiskey is at least equal in quality to whiskey which is not required to bear a statement that makes it unmarketable; and that such discriminatory treatment of Continental and its products, having no rational relation to the statutory purpose, is arbitrary, capricious and in excess of statutory authority." (*Id.* at 108, 220 F. 2d at 371.)

This Court noted that the complaint alleged that the Treasury officials did not require corn whiskey or Canadian whiskey to be labelled as stored in reused cooperage. It held:

"Applying the general rule often enunciated that the allegations of a complaint admitted by a motion to dismiss are to be construed favorably to a plaintiff [citations omitted] and having in mind at the same time that this rule in the context of the present case requires particularity of allegations to overcome the presumption of validity attaching to administrative action taken pursuant to valid delegation, *Pacific States Box & Basket Co. v. White*, *supra*, we hold that the complaint sufficiently alleges discrim-

ination to withstand a motion to dismiss. *It alleges facts which we cannot say do not show arbitrariness in this regard unless refuted or explained in the light of the purposes of the statute. . . .* Continental is entitled to opportunity to prove the alleged arbitrary character of the discriminatory treatment, which if proved, would render the ruling unlawful.

* * * *

We hold only that we are not informed by common knowledge or by judicial notice that, in view of the alleged similarity between Canadian, corn and "Embassy Club" whiskies, a ruling requiring the latter alone to be labeled "stored in reused cooperage" though the others are also so stored, is not unreasonably discriminatory. *The complaint fairly construed raises questions of fact in this regard which calls for a solution through procedures other than dismissing the complaint on motion. . . .* Should such discrimination exist, furthermore, it would lead to consumer deception rather than to its avoidance as sought by the statute." (*Id.* at 108, 220 F. 2d at 371-72; Emphasis added.)

The case was then remanded to the District Court for an evidentiary hearing to determine whether the system of discrimination between classes of whiskey set forth in the regulations was reasonable in terms of the statutory purpose of "prevention of consumer deception." *Id.* at 110, 220 F. 2d at 372-73.

On the second appeal to this Court, which was from the District Court's factual determination that the discrimination was not unreasonable in light of the statutory purpose, this Court stated:

"We held the complaint sufficient, however, to entitle Continental to an opportunity to prove the alleged arbitrary character of the discriminatory treatment accorded it. . . . The case was remanded for further proceedings.

After an evidentiary hearing, the District Court entered judgment in favor of the defendants-appellees. The court made numerous findings and conclusions, some of which are briefly paraphrased in

the remainder of this paragraph." (*Continental Distilling Corp. v. Humphrey*, 101 U. S. App. D. C. 210, 211, 247 F. 2d 796, 797 (1957)).

This Court then summarized the factual findings which were made by the District Court at the evidentiary hearing and noted that the record below contained extensive testimony and many exhibits attempting to show that the discrimination between Embassy Club and corn and Canadian whiskeys was arbitrary and capricious and that the regulation requiring that Embassy Club contain a statement that it was stored in reused cooperage was invalid.

This Court (2-1) affirmed the District Court on this second appeal⁶ holding:

"In the circumstances here, giving due weight to the *trial court's findings and factual conclusions*, we cannot say that there has been established an unreasonable and arbitrary discrimination against Continental in the form of labeling prescribed for it." (*Id.* at 212, 247 F. 2d at 798; Emphasis added.)

It is quite clear from the *Continental* case that an issue of fact was raised as to whether it was arbitrary and capricious in light of the statutory purpose of preventing deception to require Continental to state on its label that its whiskey had been stored in reused cooperage, when this was not required of other types of whiskey.

The instant case is an *a fortiori* situation to that presented in *Continental*. In *Continental* the regulation required Continental to make a true statement with reference to its product Embassy Club. The regulation in the present case has been interpreted to *prevent* Seagram from making a true, informative, and in no way misleading statement with reference to Calvert Extra. The decisions of this Court in *Continental* required the District Court, at the very least, to conduct a hearing and to make a factual finding as to whether Seagram's label was mis-

⁶ Chief Judge Edgerton dissented, finding that there was arbitrary discrimination.

leading and consequently whether appellees' action in promulgating and applying this regulation was arbitrary and capricious in terms of the statutory grant of authority.

A few months after *Continental* this Court again enunciated the applicable legal principles. In *Friend v. Lee*, 95 U. S. App. D. C. 224, 221 F. 2d 96 (1955), the Hertz representative sued the government officials charged with control of the Washington National Airport. These officials, who were empowered to issue regulations for the control of the Airport, had promulgated a regulation which prohibited "commercial activity of any nature whatsoever in the airport except with the approval of the Administrator or Airport Director and under such terms and conditions as prescribed." *Id.* at 228, 221 F. 2d at 100. The government officials applied this regulation to the plaintiff's activities to prescribe conditions which virtually precluded the delivery of rental cars by him at the Airport. *Ibid.*

The plaintiff alleged that the government officials were "interpreting and applying the regulations . . . in a capricious and arbitrary manner." *Ibid.* This Court reversed the lower court's dismissal of the complaint and held that the plaintiff had stated a *prima facie* case and was "entitled to be heard." It was noted that the activities of the plaintiff in delivering cars at the Airport might not even amount to "commercial activity," and that there was "no showing that plaintiff's use of the public space at the airport . . . has unduly congested the premises or interfered with its administration." This Court specifically pointed out:

"The real issue here, which we find specifically raised by the complaint, is not so much the extent of defendants' authority in the abstract, but the reasonableness of its exercise in relation to the appellant." (*Id.* at 229 n.7, 221 F. 2d at 101 n.7.)

Thus it is apparent from *Friend v. Lee*, that the question of the interpretation and application of regulations in a particular case cannot be done in the "abstract" but must be done with reference to the facts of a particular case and the governing statute.

In *Armour & Co. v. Freeman*, 113 U. S. App. D. C. 37, 304 F. 2d 404, *cert. denied*, 370 U. S. 920 (1962), the Secretary of Agriculture was given authority, under the Meat Inspection Act, to establish regulations to prohibit false or deceptive names in connection with meat products. The Secretary promulgated a regulation which would have required Armour to label smoked, cured hams as IMITATION HAMs, if they exceeded the weight of uncured hams due to the addition of water. Armour filed an action to enjoin the Secretary from applying the regulation to it and to have the regulation declared invalid, alleging that "Such a label . . . is deceptive, false, unauthorized by the statute and the requirement is therefore arbitrary, capricious and illegal." *Id.* at 42, 304 F. 2d at 409. The District Court denied Armour's motion for a preliminary injunction and denied the defendants' motion for summary judgment, finding that "There is a genuine issue of material fact as to whether or not the Secretary . . . acted in an arbitrary and capricious manner in adopting" the regulation. *Id.* at 39, 304 F. 2d at 406.

On appeal this Court reversed the District Court's denial of a preliminary injunction. Thereafter the defendants filed a motion for an extension of time to file for rehearing, which was denied. Defendant then sought rehearing *en banc* of this denial, which was also denied. Judge Prettyman stated:

"The complaint alleges that this proposed requirement as to weight is arbitrary and capricious and therefore void. This allegation, as the District Court correctly held, poses genuine issues of material fact and therefore must be tried." (*Id.* at 42, 304 F. 2d at 409)

In the present case Seagram has alleged that the regulation is arbitrary and capricious and beyond the statutory authority of the appellees as applied to it, for (contrary to the statutory purpose) it prevents Seagram from informing the consumer of true and material facts which are in no way misleading. (J.A. 13).

In all of the foregoing cases the basic principle is the same: If the administrative regulation as applied in a particular case achieves a result contrary to the statutory purpose, and, therefore, the authority granted the administrator by the statute, then the application (and in some cases the regulation itself) is arbitrary, capricious and unlawful. In each case this question depends for its resolution upon an individual finding of fact in the particular case which is required to be made by the District Court after a hearing.

In *Continental* the issue was whether, under the facts of that case, there was a reasonable basis (in terms of the statutory purpose of preventing consumer deception) for applying a regulation requiring the labeling of one class of whiskey differently from another; in *Armour* the issue was whether there was justification, under the facts of that case, for a regulation (in terms of the statutory purpose of preventing deception) of requiring Armour's hams with a certain water content to be labeled "IMITATION HAM"; in *Friend v. Lee* the issue was whether, under the facts of that case, administrative restrictions on Hertz were reasonable in relation to the statutory purpose of orderly regulation of the Washington National Airport.

In the instant case the issue is whether the appellees can prevent the making of true statements on labels which were informative and not misleading when the statutory purpose is that of preventing consumer deception.

Certainly the promulgation and application of a regulation having this effect is unlawful.

These three recent cases decided by this Court apply fundamental and well established principles of administrative law which provide for court review of the validity of an agency regulation when such regulation has been applied to reach a result unauthorized by the statute on which the regulation is based. Of similar effect are *Social Security Board v. Nierotko*, 327 U. S. 358 (1946) (holding regulation of Social Security Board with reference to "back pay" unlawful as contrary to the statutory purpose); *Addison v. Holly Hill Fruit Products Co.*, 322 U. S. 607 (1944) (holding

Wage and Hour Division regulation defining "area of production" invalid as based on factors inconsistent with the statutory purpose); and *Morrill v. Jones*, 106 U. S. 466 (1883) (holding Treasury regulation making the quality of imported animals a criteria for the determination of customs duties invalid since no such criteria were contained in the statute). See also *Denver Stock Yard v. Livestock Assn.*, 356 U. S. 282 (1958) (holding a regulation under the Packers and Stockyards Act invalid as contrary to the statute); *F. C. C. v. American Broadcasting Co.*, 347 U. S. 284 (1954) (holding a Federal Communications Commission regulation invalid); *Brannan v. Stark*, 342 U. S. 451 (1952) (holding an Agricultural Marketing Agreement Act regulation invalid); *Helvering v. Credit Alliance Co.*, 316 U. S. 107 (1942) (holding a Treasury regulation invalid).

In all of the foregoing cases the Supreme Court judged the validity of a regulation in terms of its application to a specific factual situation, and the statutory purpose and language. In none did it limit itself to a review of an administrative record made in connection with the applicable regulation, as distinguished from a record concerning the facts in a particular case.

Appellees and intervenors placed primary reliance in the District Court on the case of *National Broadcasting Co. v. United States*, 319 U. S. 190, 227 (1943). They contended, on the basis of this case, that the District Court was limited to an examination of exhibits, selected and submitted by appellees, consisting of hearings in 1948 and 1956 conducted by appellees with reference to proposed changes in the regulation. Appellees misapprehend the true impact of that decision.

In the *N. B. C.* case the plaintiffs attacked the validity of an elaborate system of regulations governing chain broadcasting before any application of said regulations. These regulations had been promulgated pursuant to the Communications Act of 1934 authorizing the Commission to make regulations governing licensing in the public interest, convenience, and necessity. Prior to adoption of the regulations, hearings were held before the Commission last-

ing 48 days; 8,000 pages of transcript were taken and 700 exhibits were introduced and all interested parties received notice, participated in the hearings and submitted briefs. The Supreme Court approved the action of the District Court, which sustained the regulations, stating:

"The District Court, by granting the Government's motion for summary judgment, disposed of the case upon the pleadings and upon the record made before the Commission. The court below correctly held that its inquiry was limited to review of the evidence before the Commission. Trial *de novo* of the matters heard by the Commission and dealt with in its Report would have been improper." (*Id.* at 227)

The action in the *N. B. C.* case was one to set aside and enjoin the promulgation of regulations prior to their application. It was not an action to set aside the specific application of a regulation as arbitrary. Since the promulgation of the regulations was the administrative action being reviewed in *N. B. C.*, the record to be examined was the hearing before the agency. It is extraordinary for appellees to contend as they did before the District Court that appellant is asking for a "Trial *de novo* of the matters heard by the Commission." There was never any hearing before the Commission as to appellant's neutral spirits and whether these spirits improved by storage for more than four years in reused cooperage.

The Court in *N. B. C.* recognized the distinction between an action attacking an entire set of regulations and an action challenging the validity of a regulation because of its application to the facts of a particular case. It held:

"... In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.' If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations." (*Id.* at 225)

N. B. C. and the cases cited therein were all actions to set aside regulations as arbitrary because contrary to the statutory purpose; they were not actions challenging regulations as they applied in a particular case. Since the promulgation of the regulation was the administrative action being reviewed, the record to be examined was that of the hearing before the agency with reference to the promulgation of the regulation.

In the instant case the agency action which is challenged is the disapproval of appellant's label application. The administrative record to be reviewed here would be the factual record with reference to appellant's label. There was never a hearing with reference to the effect of storage for four years in reused cooperage on appellant's specially distilled neutral spirits, or whether these neutral spirits did or did not improve by storage for four years in reused cooperage. Thus there could not be a determination as to whether appellant's label did or did not violate the statute.

It is true that if it is found that the application of the regulation to appellant is arbitrary and capricious (in terms of the statutory purpose of preventing deception) the regulation itself may be invalid. However, this does not convert the instant action into one attacking the promulgation and general validity of a regulation such as in *N. B. C.*, and therefore the reviewing court cannot be confined to an examination of the record before the agency in connection with the promulgation of the regulation.

The distinction between an action attacking the promulgation of a regulation as in *N. B. C.* and an action challenging the application of a regulation in a particular case is well recognized.

In the *Final Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. 8, 77th Cong., 1st Sess. (1941)⁷ it is stated that in injunction suits to

⁷ This "landmark in the field of administrative law" contained "the main origins of the present Administrative Procedure Act." *Attorney General's Manual on the Administrative Procedure Act* (1947), p. 5.

prevent enforcement of an administrative regulation, or in declaratory judgment proceedings:

"...the issue may be either the validity of a regulation as a whole or the legality of applying it to the person who is challenging it, in the same way that an attack upon a statute may involve either the constitutionality of the measure as a whole or the constitutionality of applying it to a particular party.

"Where the legality of applying a regulation to a particular objector is in question, the issue is comparatively narrow. The relevant evidence relates to the business or transactions or affairs of an individual or corporation; *the pertinent legal question is the applicability of the statute under which the regulation was promulgated to the facts thus revealed.* The decision will be the kind courts are accustomed to render in regard to many matters that come before them." (*Id.* at 115; *Emphasis added*)

The distinction was pointed out by this Court in *Functional Music, Inc. v. F. C. C.*, 107 U. S. App. D. C. 34, 274 F. 2d 543 (1958), *cert. denied*, 361 U. S. 813 (1959). In that case the F. C. C. had established rules requiring that FM broadcasters curtail their activities in supplying FM music on a subscription basis. The rules were initially promulgated in 1955, after extensive hearings, but were not implemented by the F. C. C. until 1958. In 1958, Functional Music, Incorporated, which was engaged in supplying FM music on a subscription basis, applied to the F. C. C. asking that the 1955 rules be abandoned or that their application be stayed. This Court held the 1955 rules to be invalid, both on the basis of the particular facts concerning Functional Music, Incorporated's operations and on the basis of the purpose of the Federal Communications Act. The Court stated:

"While the parties have not specifically put in question our jurisdiction to examine the validity of the 1955 rules in these proceedings, jurisdiction is, of course, always a threshold consideration.

"The rules here attacked were initially promulgated in 1955. It very well may be that they were

then sufficiently final to support judicial review. No such review had been sought, however. And as to those rules, the statutory period specified for review of, or appeal from, Commission orders and decisions has now long since passed. Nevertheless, we are persuaded that judicial examination is now permissible. As applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it. *For unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.* And see *Columbia-Broadcasting System v. United States*, 1941, 316 U. S. 407, 421, 62 S. Ct. 1194, 86 L. Ed. 1563, for example, where the Supreme Court clearly contemplated the continuing availability of review of Communications Commission rules and regulations." (*Id.* at 37-38, 274 F. 2d at 546-47; Emphasis added)

The District Court in this case should have considered and decided the basic material issue of fact as to whether Seagram's label was, in fact, misleading and thus violative of the Act. This issue could not be determined on the basis of the record leading up to the promulgation of the regulation since it depends for its resolution on the facts of this case. Since appellant's allegations that its label was true, not misleading and informative were uncontroverted, judgment should have been entered in appellant's, not appellees', favor. It was manifest error for the District Court to strike appellant's affidavits and grant summary judgment.

II.

The District Court denied Appellant due process in failing to grant it an evidentiary hearing.

The Fifth Amendment to the Constitution provides that no person shall be deprived of life, liberty or property without due process of law. The Supreme Court has interpreted this provision on numerous occasions to require that a person be accorded a full and fair hearing before depriving him of a right. This hearing under most statutes is afforded at the administrative level, but due process is satisfied if the right to a hearing is afforded in the courts after administrative action. However, a failure to afford a factual hearing at either level is clearly a denial of due process. See *Ewing v. Mytinger & Casselberry, Inc.*, 339 U. S. 594, 598-600 (1950); *Bowles v. Willingham*, 321 U. S. 503, 519 (1944); *Yakus v. United States*, 321 U. S. 414, 434-37 (1944); *Ohio Bell Telephone Co. v. Comm.*, 301 U. S. 292, 300 (1937).

In the present case, since Seagram had no opportunity to present evidence upon its application at the administrative level, due process necessitates that such evidence be received and considered in the District Court. The statutory scheme of the Act clearly contemplates such a hearing.

Section 4 of the Act (27 U. S. C. §204) governs provisions for basic permits to operate as distillers, rectifiers, etc. If upon examination of an application for a basic permit there is reason to believe an applicant is not entitled to a permit, a hearing is afforded and findings are required as the basis of an order. (27 U. S. C. §204(h)) The traditional appellate route from a denial of an application is provided, i.e. to a Circuit Court of Appeals, with the proviso that findings of fact at the administrative level, if supported by substantial evidence, are conclusive.

This provision for court review is discussed in the report of the Committee on Ways and Means. (H. R. Rep. No. 1542, 75th Cong., 1st Sess. 9 (1935)). The provision

was "inserted in order to comply with the constitutional requirements that a man's right to do business may not be denied administratively even in pursuance of a federal power, without his having his day in court." *Ibid.* As to the mode of review, the report states:

"Review in the circuit court is thought to be more desirable than review in the district court in order that there may not be the delay and expense consequent upon a lawsuit in the district court and appeal from that court's action to the court of appeals. Further, review of the order is in substance an appellate function which is not within the usual function of district court jurisdiction but rather within that of the circuit court of appeals." (*Ibid.*)

However, Section 5 of the Act which provides for certificates of label approval, does not provide for or require a hearing or findings before denial of an application for label approval. There is no provision for a hearing at the administrative level with review by a Circuit Court of Appeals on the record of the administrative hearing as provided in Section 4. Instead Congress granted the District Courts jurisdiction of suits to enjoin, annul or suspend any final action upon any label application. (27 U. S. C. §205(e)). Clearly Congress, which was aware in enacting Section 4 of the Act of the requirement of providing a hearing to afford due process, intended such a suit under Section 5 to be the "usual function of district court jurisdiction", i.e. a trial on the merits with the right to introduce evidence, so as to provide a party his constitutionally required hearing and his "day in court."

Appellees and intervenors seemed to contend in the District Court that the requirement of a hearing in this case has been satisfied by the hearings held after the promulgation of the regulation and prior to the setting aside of the neutral spirits in question. They sought to have this case decided in the "abstract". This, however, does not satisfy the requirement of a hearing in connection with the particular case in controversy. The real issue is not the "defendants' [appellees'] authority in the abstract" or the validity

of their regulation in the abstract, "but the reasonableness of its exercise in relation to" appellant. *Friend v. Lee*, *supra*, 95 U. S. App. D. C. at 230 n. 7, 221 F. 2d at 102 n. 7.

In the present case the action of the District Court in approving appellees' summary rejection of Seagram's application based on a regulation, deprived Seagram of its statutory right to a hearing, ignored the statutory standards, and precluded the possibility of any effective judicial review by this Court.

No prior court case under section 5 of the Act (27 U. S. C. §205) has been limited to review of the proceedings connected with the promulgation of a regulation. Instead the issue has been whether the denial of the application for label approval contravened the governing statutory provisions. See *Continental Distilling Corp. v. Humphrey*, 95 U. S. App. D. C. 104, 220 F. 2d 367 (1954); *Gibson Wine Co. v. Snyder*, 90 U. S. App. D. C. 135, 194 F. 2d 329 (1952).

The District Court's action in this case has denied Seagram its fundamental right to establish through an evidentiary hearing that the action of appellees was arbitrary and capricious because the statements it sought to make on its label were true, not misleading and informative.

III.

The exhibits submitted by Appellees do not support the action of the District Court.

In connection with the motion for summary judgment appellees submitted 17 exhibits to the District Court contending that these exhibits constituted the administrative "record" of the action complained of and that the Court could consider only this "record" in determining the motion. The District Court evidently accepted this contention since it granted the motion to strike appellant's affidavits in opposition to the motions for summary judgment and granted the motions for summary judgment as well.

The 17 exhibits submitted to the District Court do not comprise the administrative "record" in any proceeding. Instead each exhibit has a separate certification that it is a true copy of a document or a portion of a document contained in the files of the Treasury Department, which was selected by some unidentified person. These exhibits date from 1934 through 1963. There is no statement that these exhibits represent all the material in the files of the Treasury Department relating to the regulation in question. The 1935 transcript of the hearing, which preceded promulgation of the regulation in question (J.A. 33), is one document in the Treasury files which was not produced.

Even if the District Court properly limited itself to the selected exhibits submitted by appellees, an examination of these "exhibits" reveals no evidence which could furnish factual support for the regulation in question. Exhibits 1, 2 (J.A. 21), 3 (J.A. 25) and 4 (J.A. 28) constitute the entire administrative record with reference to plaintiff's application for a certificate of label approval, its denial, and then its subsequent approval after certain language was deleted. This is the administrative action here complained of as being arbitrary and capricious. This record contains no evidence with reference to the factual matters here in dispute.

Exhibits 5, 6, 8 and 9 (J.A. 16-18) consist of various misbranding rulings and regulations of the Federal Alcohol Control Administration. The only possibly relevant exhibits are rulings No. 4 (J.A. 32), a memoranda of General Counsel's Office, and No. 57, a Letter of General Counsel's Office (J.A. 49-50). Neither of these rulings was acted upon by the Board of the Federal Alcohol Control Administration (J.A. 31, 49). Thus they are merely informal opinions of the General Counsel's Office, unsupported by any evidence of record, and are clearly not factual bases for the regulation subsequently promulgated by the Secretary of the Treasury. Furthermore, these

rulings were made under authority of the National Industrial Recovery Act without a hearing. After this Act was held unconstitutional in 1935, these rulings lost any legal validity they may have had.

The remaining exhibits consist of various notices, transcripts of hearings, and expressions of opinion pro and con (J. A. 16-18). These exhibits relating primarily to hearings in 1948 and 1956 are clearly an insufficient basis to support the validity of the regulation made in 1936, much less to support a finding that the specially distilled neutral spirits in Calvert Extra did not substantially improve by storage for at least four years in reused cooperage. There was no evidence given at these hearings (which consist largely of statements by attorneys for distillers) which was probative that the quality of neutral spirits do not improve or that statements to such effect would mislead the consumer. The record fails to disclose that any person submitted chemical tests or organoleptic (taste and odor) tests of neutral spirits before and after storage, or that there ever had been any actual ascertainment of consumer reaction.

However, since there was never any hearing as to appellant's neutral spirits, there is in reality no administrative "record" to review. None of appellees' exhibits contain any reference to appellant's specially distilled neutral spirits which were stored for four years.

Conclusion.

The complaint and uncontroverted affidavits submitted by appellant establish that Seagram's proposed label for Calvert Extra was true, in no way misleading and informative. Therefore it conformed with the statutory requirements of the Act. Under these circumstances appellees' promulgation and application of a regulation prohibiting such statements is contrary to the statutory purpose and unlawful.

Due process requires an evidentiary hearing to determine whether the statements prohibited by appellees were, in fact, true, not misleading and informative.

The order and judgment of the District Court granting appellees' motion to strike appellant's affidavits in opposition to the motions for summary judgment and in granting said motions were erroneous and should be reversed. The case should be remanded for an evidentiary hearing to afford Seagram an opportunity to establish that its proposed label was in no way misleading and that the action of appellees was arbitrary and capricious.

Dated: April 13, 1964

Respectfully submitted,

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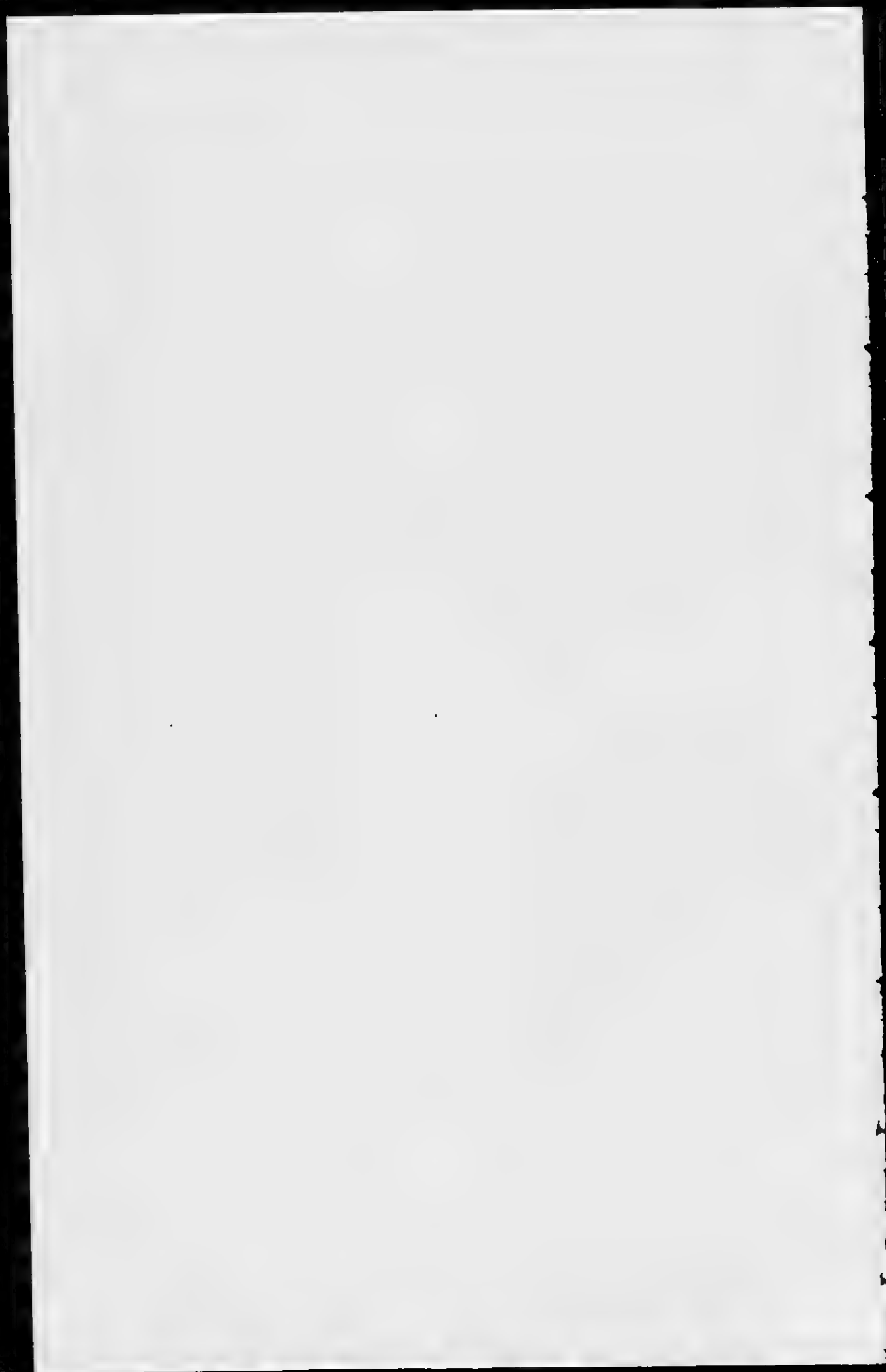
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APPENDIX



APPENDIX.**UNITED STATES CONSTITUTION AMENDMENT V.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

PERTINENT PROVISIONS OF SECTION 5 OF THE FEDERAL ALCOHOL ADMINISTRATION ACT OF AUGUST 29, 1935, 49 STAT. 981 (1935), AS AMENDED, 27 U. S. C. §205 (1959) AND THE RELEVANT REGULATION THEREUNDER, 27 C. F. R. §5.39 (d) (1961)

Sec. 5. It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

• • •

(e) Labeling.—To sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or to receive therein, or to remove from customs custody for consumption, any distilled spirits, wine, or malt beverages in bottles, unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding, and labeling and size and fill of container (1) as will prohibit deception of the

Appendix.

consumer with respect to such products or the quantity thereof and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guarantees, and scientific or irrelevant matters as the Secretary of the Treasury finds to be likely to mislead the consumer; (2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are hereby prohibited unless required by State law and except that, in case of wines, statements of alcoholic content shall be required only for wines containing more than 14 per centum of alcohol by volume), the net contents of the package, and the manufacturer or bottler or importer of the product; (3) as will require an accurate statement, in the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification, if neutral spirits have been used in the production thereof, informing the consumer of the percentage of neutral spirits so used and of the name of the commodity from which such neutral spirits have been distilled, or in case of neutral spirits or of gin produced by a process of continuous distillation, the name of the commodity from which distilled; (4) as will prohibit statements on the label that are disparaging of a competitor's products or are false, misleading, obscene, or indecent; (5) as will prevent deception of the consumer by use of a trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, or is a name that is in simulation or is an abbreviation thereof, and as will prevent the use of a graphic, pictorial, or emblematic representation of any such individual or organization, if the use of such name or representation is likely falsely to lead the consumer to believe that the product has been indorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of, such individual or organization:

Appendix.

Provided, That this clause shall not apply to the use of the name of any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer, wholesaler, retailer, bottler, or warehouseman, of distilled spirits, wine, or malt beverages, nor to the use by any person of a trade or brand name used by him or his predecessor in interest prior to the date of the enactment of this Act; including regulations requiring, at time of release from customs custody, certificates issued by foreign governments covering origin, age, and identity of imported products: Provided further, That nothing herein nor any decision, ruling, or regulation of any Department of the Government shall deny the right of any person to use any trade name or brand of foreign origin not presently effectively registered in the United States Patent Office which has been used by such person or predecessors in the United States for a period of at least five years last past, if the use of such name or brand is qualified by the name of the locality in the United States in which the product is produced, and, in the case of the use of such name or brand on any label or in any advertisement, if such qualification is as conspicuous as such name or brand.

It shall be unlawful for any person to alter, mutilate, destroy, obliterate, or remove any mark, brand, or label upon distilled spirits, wine, or malt beverages held for sale in interstate or foreign commerce or after shipment therein, except as authorized by Federal law or except pursuant to regulations of the Secretary of the Treasury authorizing relabeling for purposes of compliance with the requirements of this subsection or of State law.

In order to prevent the sale or shipment or other introduction of distilled spirits, wine, or malt beverages in interstate or foreign commerce, if bottled, packaged, or labeled in violation of the requirements of this subsection, (1) no bottler of distilled spirits, no producer, blender, or wholesaler of wine, or proprietor of a bonded wine store-

Appendix.

room, and no brewer or wholesaler of malt beverages shall bottle, and (2) no person shall remove from customs custody, in bottles, for sale or any other commercial purpose, distilled spirits, wine, or malt beverages, respectively, after such date as the Secretary of the Treasury fixes as the earliest practicable date for the application of the provisions of this subsection to any class of such persons (but not later than August 15 1936, in the case of distilled spirits, and December 15, 1936, in the case of wine and malt beverages, and only after thirty days' public notice), unless upon application to the Secretary of the Treasury, he has obtained and has in his possession a certificate of label approval covering the distilled spirits, wine, or malt beverages, issued by the Secretary of the Treasury in such manner and form as he shall by regulations prescribe: Provided, That any such bottler of distilled spirits, or producer, blender, or wholesaler of wine, or proprietor of a bonded wine storeroom, or brewer or wholesaler of malt beverages shall be exempt from the requirements of this subsection if, upon application to the Secretary of the Treasury, he shows to the satisfaction of the Secretary of the Treasury, that the distilled spirits, wine, or malt beverages to be bottled by the applicant are not to be sold, or offered for sale, or shipped or delivered for shipment, or otherwise introduced, in interstate or foreign commerce. Officers of internal revenue are authorized and directed to withhold the release of distilled spirits from the bottling plant unless such certificates have been obtained, or unless the application of the bottler for exemption has been granted by the Secretary of the Treasury; and customs officers are authorized and directed to withhold the release from customs custody of distilled spirits, wine, and malt beverages, unless such certificates have been obtained. The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States court for any Territory shall have jurisdiction of suits to enjoin, annul, or suspend in whole or in

Appendix.

part any final action by the Secretary of the Treasury upon any application under this subsection; or

• • • • •

The Secretary of the Treasury shall give reasonable public notice, and afford to interested parties opportunity for hearing, prior to prescribing regulations to carry out the provisions of this section.

SECTION 5.39 OF THE LABELING REQUIREMENTS FOR DISTILLED SPIRITS, 27 C. F. R. §5.39 (1961)

§5.39 STATEMENTS OF AGE AND PERCENTAGE.

• • • • •

(d) *Other distilled spirits.* Age, maturity, or similar statements or representations as to neutral spirits, gin liqueurs, cordials, vodka, cocktails, gin fizzes, highballs, bitters, and specialties are misleading and are prohibited from being stated on any label.

BRIEF FOR GOVERNMENT APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 18,465

APR 13 1954

William J. Paulson
CLERK

JOSEPH E. SEAGRAM & SONS, INC., APPELLANT

v.

HONORABLE DOUGLAS DILLON, ET AL., APPELLEES

**Appeal from the United States District Court
for the District of Columbia**

DAVID C. ACHESON,
United States Attorney.

GIL ZIMMERMAN,
FRANK Q. NEBEKER,
Assistant United States Attorneys.

QUESTION PRESENTED

Where:

- (A) Relevant statutes provide for public rule-making procedures for adoption and amendment of regulations controlling "age claim" labeling of distilled spirits; and
- (B) The consensus of the Distilled Spirits Industry and the rationally supported determination of the Administrators is that "age claims" as to neutral spirits are misleading to the consumer, and such "age claims" are prohibited by regulation; and
- (C) This determination has been adhered to since 1936 (when the regulations were adopted) and in 1948 and 1956 (when proposed amendments to permit such "age claims" were not adopted); and
- (D) Appellant participated in all the rule-making proceedings, offered no data in support of its present assertion that such "age claims" as to neutral spirits are not misleading, and has not sought amendment of the regulations; and
- (E) Appellant, after being refused permission by the Administrators to make an "age claim" for the neutral spirits contained in its blended whiskey, for the first time offered affidavits and exhibits in the District Court in support of its present contention, thus seeking to obtain a judicial trial *de novo* on the issue, and to substitute judicial judgment for administrative expertise, and to force amendment of the regulation barring such "age claims", to the exclusive advantage of appellant over others in the Industry—

Did not the District Court:

- (1) Properly strike the proffered affidavits and exhibits comprising material *dehors* the certified administrative records; and
- (2) Grant appellees' motions for summary judgment based on the certified administrative records, and the administrative determination rationally supported by these administrative records?

INDEX

	Page
Counterstatement of the case.....	1
A. History of the Regulation.....	5
(1) Provisions of the Federal Alcohol Administra- tion Act.....	5
(2) The Regulations.....	6
B. Denial of Appellant's Application for Label Ap- proval.....	20
Statutes and Regulations Involved.....	22
Summary of Argument.....	22
Argument:	
Summary judgment was correctly granted in appellees' favor; appellant was not entitled to any judicial trial <i>de novo</i> in connection with its collateral attack on the Distilled Spirits Labeling Regulation.....	23
Conclusion.....	30
Appendix.....	31

TABLE OF CASES

* <i>Acker v. United States</i> , 298 U.S. 426 (1936).....	27
<i>American Tel. & Tel. Co. v. United States</i> , 299 U.S. 232 (1936).....	26
* <i>American Trucking Ass'n. Inc. v. United States</i> , 344 U.S. 298 (1953).....	29
<i>Armour & Co. v. Freeman</i> , 113 U.S. App. D.C. 37, 304 F.2d 404, cert. denied, 370 U.S. 920 (1962).....	29
<i>Continental Distilling Corp. v. Humphrey</i> , 101 U.S. App. D.C., 210, 247 F.2d 796 (1957).....	4, 25, 28, 29
* <i>Federal Power Commission v. Colorado Interstate Gas Co.</i> , 348 U.S. 492 (1955).....	26
* <i>Federal Security Administrator v. Quaker Oats Co.</i> , 318 U.S. 218 (1943).....	29
<i>Gibson Wine Co. v. Snyder</i> , 90 U.S. App. D.C. 135, 194 F.2d 329 (1952).....	30
* <i>Mitchell v. Budd</i> , 350 U.S. 473, reh. denied, 351 U.S. 934 (1956).....	29
* <i>National Broadcasting Co. v. United States</i> , 319 U.S. 190 (1943).....	23, 27, 28
* <i>Tagg Bros. & Moorhead v. United States</i> , 280 U.S. 420 (1930).....	26, 27, 28

* Cases chiefly relied upon are marked by asterisks.

II

Cases—Continued	Page
* <i>Unemployment Compensation Commission, etc. v. Aragon</i> , 329 U.S. 143 (1946).....	26
* <i>United States v. Carlos Bianchi & Co.</i> , 373 U.S. 709 (1963)..	23, 28
* <i>United States v. L. A. Tucker Truck Lines, Inc.</i> , 344 U.S. 33 (1952).....	26
* <i>Willapoint Oysters v. Ewing</i> , 174 F.2d 676 (9th Cir. 1949)...	30

OTHER REFERENCES

Report of the Committee on Finance on H.R. 8870, Senate Report No. 1215, 74th Cong., 1st Sess., pp. 3, 7.....	5
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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,465

JOSEPH E. SEAGRAM & SONS, INC., APPELLANT

v.

HONORABLE DOUGLAS DILLON, ET AL., APPELLEES

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR GOVERNMENT APPELLEES

COUNTERSTATEMENT OF THE CASE

This is an appeal from the judgment of the District Court granting Government and Intervenor appellees' motions for summary judgment and Government appellees' motion to strike plaintiff's affidavits and attached exhibits. Judgment was entered January 2, 1964. (J.A. I, 91A.)

The case involves judicial review of administrative action taken by the Secretary of the Treasury's delegates under the Federal Alcohol Administration Act¹ and Regulations promulgated thereunder.

¹ 49 Stat. 977, *et seq.*, as amended, 27 U.S.C. 201, *et seq.*; hereinafter referred to as "the Act".

Appellant applied for approval of a proposed label for its "Calvert Extra" blended whiskey. This proposed label contained a statement as to storage of the grain neutral spirits in the product "for at least four years" in barrels previously used for aging its "fine whiskies." (J.A. I, 22A-24-A.) The Labeling Regulations² prohibit "age, maturity or similar statements or representations as to neutral spirits" from being stated on any label. The Secretary of the Treasury's delegates denied the application on the ground that appellant's proposed label contravened the applicable Regulation. (J.A. II, 112A-114A.)

In this litigation, appellant challenges the administrative denial of its label application, and contends the Regulation is invalid. (J.A. I, 12A-13A, 14A.) The District Court (by its memorandum opinion entered December 26, 1963) decided that appellant's proposed label does violate the Regulation, that the Regulation is not arbitrary or capricious; that it was validly adopted under authority of the Federal Alcohol Administration Act; and that appellant's contention that the Regulation is being arbitrarily and capriciously applied in appellant's case is without merit as a matter of law. (J.A. I, 90A.)

Appellant sought in the court below to convert these judicial review proceedings into a judicial trial *de novo*. It submitted affidavits, with attached exhibits. Moreover, at the argument appellant produced samples of neutral spirits and actually sought to have the District Court taste them, in order to discern the alleged difference which appellant contends distinguishes its neutral spirits from other neutral spirits.

Government appellees moved to strike these materials proffered by appellant. As grounds therefor, they averred (J.A. I, 86A-88A):

1. Plaintiff is submitting this new material entirely *dehors* the certified administrative records. And this

² These Regulations appear in Title 27, C.F.R. (Rev. ed., 1961), entitled "Intoxicating Liquors." The specific provision in these Regulations challenged here is 27 C.F.R. 5. 39(d); hereinafter referred to as "the Regulation."

is being done in connection with what clearly appears to be a collateral attack upon the legislative-type labeling regulations the Administrators of the Federal Alcohol Administration Act promulgated pursuant to the authority that Act expressly confers on them to issue such regulations.

2. The legislative-type labeling regulations collaterally attacked here were issued in 1936—some 28 years ago. They were issued by the Administrators only after holding a legislative-type hearing, such as is prescribed by the Act. At that hearing all interested parties—including plaintiff—were afforded full opportunity to participate in the Administrators' rule-making process through the submission to the Administrators of whatever written data, views, arguments, etc., they desired to have the Administrators consider before issuing the regulations. Twice thereafter, in 1948 and again in 1956, the Administrators held such legislative-type hearings, to consider whether the labeling regulations should be amended so as to permit the very kind of statements as to storage in oak containers, to appear on distilled spirits bottle labels, which plaintiff here seeks to have the Administrators compelled to permit by court order. At such legislative-type hearings, all interested parties—including plaintiff—were afforded full opportunity to participate in the Administrators' rule-making process through the submission to the Administrators of whatever written data, views, arguments, etc., they desired to have the Administrators consider.

3. All the pertinent certified administrative records³

³ Appellant raised no issue in the court below as to Government Appellees' representation that the certified administrative records filed by them constitute *all* the pertinent certified administrative records relating to the challenged Regulation. (See, also, J.A. I, 16A § 2; J.A. II, 105A, § 4; J.A. II, 145 A, 3d par.) For the first time in this litigation, appellant now on this appeal (Br. 27) seeks to raise an issue in this regard. To dispel any doubt, Government appellees assert here that the certified administrative records filed by them in the District Court comprise the *entire* administrative

of those legislative-type hearings have been placed before this Court as exhibits incorporated into defendants' motion for summary judgment. Those records fully advise this Court "of the considerations which caused the administrative agency" originally to issue the challenged regulations in 1936, and then in 1948 and again in 1956 to determine that no change should be made in them. (See *Continental Distilling Corp. v. Humphrey*, 101 U.S. App. D. C. 210, 212, 247 F.2d 796, 798 (1957) (fn.2).)

4. Plaintiff has no basis whatsoever to—and in fact does not—advance any claim here that it did not have full opportunity to present to the Administrators the very written data, views, arguments, etc., it seeks to present *dehors* the administrative record to this Court by means of the affidavits and attached exhibits it proffers to this Court. Plaintiff failed to submit so much of such material as it had available for consideration by the Administrators at the legislative-type hearings held to consider changing the outstanding regulations. And it also failed to submit so much of such material as it acquired thereafter for consideration by the Administrators. No record appears as to any petition for amendment to the outstanding regulations, which plaintiff could have submitted under Section 4(d) of the Administrative Procedure Act, 5 U.S.C. 1003(d). (See affidavit marked Government Exhibit "A", attached hereto and incorporated herein.) And no reason appears why plaintiff utterly failed to follow proper administrative procedure and exhaust its administrative remedies before burdening this Court with this matter.

5. Under these circumstances, it would be error for this Court to receive and consider such affidavits and attached exhibits as plaintiff proffers here *dehors* the

records relating to the challenged Regulation.

They note, too, these records have always been public and available to appellant for examination at any time. The availability of these records is generally well known to members of the Distilled Spirits Industry.

certified administrative records of the legislative-type hearings held in this matter by the Administrators pursuant to statute. And it would violate the settled doctrine of exhaustion of administrative remedies if the Court were to receive and consider such affidavits and attached exhibits which plaintiff should have submitted—but failed to submit—to the Administrators for their consideration. [Footnote supplied.]

* * * *

The District Court granted Government appellees' motion to strike appellant's affidavits and attached exhibits. (J.A. I, 90.) At the argument the Court declined appellant's proffer of the neutral spirits samples for testing. Appellant contends (Br., Points I & II) that the District Court erred in striking its affidavits, and in declining to conduct a judicial trial *de novo* in this matter.

A. History of the Regulation

(1) *Provisions of the Federal Alcohol Administration Act.*

The Act makes provision for Federal regulation of the liquor industry, including supervision "to restrict unlawful and unfair practices in the liquor business." One of its essential objects is "to prevent the recurrence of those evils known to be present in the liquor traffic in the past and which no fair-minded citizen wishes to be restored." Among the evils sought to be corrected by the Act were certain specified practices, including those "relating to false labeling and false advertising or labeling or advertising that is not adequately informative, to the end of affording the consumer adequate protection and of preventing unfair competition."⁴

Section 5⁵ of the Act is entitled "Unfair Competition and Unlawful Practices." Section 5(e)⁶ authorized the

⁴ Report of the Committee on Finance on H.R. 8870, Senate Report No. 1215, 74th Cong., 1st Sess., pp. 3, 7.

⁵ 27 U.S.C. 205

⁶ 27 U.S.C. 205 (e)

Secretary of the Treasury to prescribe regulations governing the labeling of distilled spirits bottles for introduction into, or receipt in, interstate or foreign commerce. Among the legislative standards prescribed by Congress for such regulations are that the regulations be such—

(1) *“as will prohibit deception of the consumer with respect to such products * * * and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, * * * as the Secretary of the Treasury finds to be likely to mislead the consumer; (2) as will provide the consumer with adequate information as to the identity and quality of the products * * *; (3) as will require an accurate statement, in the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification, informing the consumer of the percentage of neutral spirits so used and of the name of the commodity from which such neutral spirits have been distilled; (4) as will prohibit statements on the label that are disparaging of a competitor’s products or are false, misleading, obscene, or indecent * * *.”* [Emphasis supplied.]

Section 5(f)⁷ of the Act requires in substance that reasonable public notice be given to all interested persons before any Labeling Regulations are issued; that a legislative-type hearing be held in connection with the issuance of such regulations, at which such interested persons are to be afforded an opportunity to present written data, views, arguments, etc.; and that the Secretary of the Treasury’s delegates consider such representations and material in arriving at their determination.

(2) The Regulation

Regulations No. 5 Relating to Labeling and Advertising Distilled Spirits,⁸ issued pursuant to section 5(e) and (f)

⁷ 27 U.S.C. 205 (f) (last par.)

⁸ These Regulations are now codified as 27 C.F.R., Part 5.

of the Act, were originally approved by the Secretary of the Treasury on January 18, 1936, after due notice and hearing.

The particular Regulation appellant challenges here, 27 C.F.R. 5.39(d), was promulgated in 1936 with the full consensus of the Distilled Spirits Industry. The entire Industry—including appellant—then had full opportunity to present written data, views, arguments, etc., at the legislative-type hearing held pursuant to statute before that Regulation was issued. No one in the Industry took issue with the promulgation of the Regulation in its present form. (J.A. I, 33A-48A.)

In Subpart C of the Regulations are found the standards of identity for the various classes and types of distilled spirits, to which products labeled with these designations must conform. Section 5.21(a) defines the term "neutral spirits" or "alcohol" as "distilled spirits distilled from any material at or above 190° proof,⁹ whether or not such proof is subsequently reduced." Section 5.21(b) defines "whisky" as being distilled from grain at less than 190° proof "in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to whisky." Section 5.21(b)(7) defines "blended whiskey" as a mixture of at least 20 percent by volume of 100° proof straight whiskey¹⁰ and other whisky or neutral spirits.

Subpart F contains the requirements for obtaining certificates of label approval applicable to domestically bottled distilled spirits. Section 5.50 of this subpart provides that no person shall bottle distilled spirits or remove such spirits from his distilled spirits plant unless the labels

⁹ "Proof" is any alcoholic content. The percentage of ethyl alcohol in distilled spirits is stated at twice the percentage of such alcohol by volume at a temperature of 60°F. For example, 95% alcohol would be 190° proof; whiskey with 50% alcohol is 100° proof whiskey.

¹⁰ "Straight whisky" is defined as whisky distilled from grain at not exceeding 160° proof, and aged, generally, for not less than 24 calendar months.

thereon are covered by a certificate of label approval issued upon application therefor.

The definition of "age" in section 5.10(j) of Subpart B states:

*"Age" means the period during which, after distillation and before bottling, distilled spirits have been kept in oak containers * * *. [Emphasis supplied.]*

The particular provision of the Regulations, 27 C.F.R. 5.39(d)¹¹, which appellant challenges here is found in Subpart D. It reads as follows.

Age, maturity, or similar statements or representations as to neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs, bitters, and specialties are misleading and are prohibited from being stated on any label. [Emphasis supplied.]

In addition, Section 5.39(e) (5) contains the following provision, not referred to in appellant's complaint, which is also pertinent here since it is essentially to the same effect as Section 5.39(d) :

*Age, maturity or similar representations as to neutral spirits, gin liqueurs, cordials, vodka, cocktails, gin fizzes, highballs, and bitters, are misleading, and shall not appear upon any label, except that the use of the word "old" or other word denoting age, appearing as part of the brand name, shall not be deemed to be an age representation in the case of such distilled spirits. * * *.*

[Emphasis supplied.]

These Regulations promulgated in 1936 carry forward into current effect the prior rulings of the Federal Alcohol Control Administration on the point in issue here.

¹¹ Paragraph 2 of Treasury Decision 6288 published in the issue of the Federal Register for April 3, 1958, 23 F.R. 2180, provided for the deletion of subparagraph (c) of section 5.39, effective April 3, 1961, and the relettering of subparagraph (d) as (c). However, apparently through oversight, this change has not been reflected in the Code of Federal Regulations. Hence, this Regulation still bears the official designation of 27 C.F.R. 5.39 (d).

Consistent information was contemporaneously circulated by the Secretary of the Treasury's delegates within the Industry.¹²

On August 25, 1948, there was published in the Federal Register¹³ (13 F.R. 4927) a notice of public hearing to be held on October 25, 1948, to consider various proposals to amend the Regulations relating to Labeling and Advertising Distilled Spirits (27 C.F.R., Part 5). Among the proposals included in that notice was the following:

10. To amend section 39(d) and (e) (27 C.F.R. 5.39(d) and (e), 64(C) (27 C.F.R. 64(c)) and other pertinent sections of the regulations so as to except from the prohibition against statements and representations relating to age in the case of neutral spirits, general and inconspicuous references of an informative nature, on back labels or in advertisements, to production methods involving "mellowing", "softening", "velveting", or "smoothing" neutral spirits through storage in oak cooperage for a period of not less than 6 months.

¹² Misbranding Ruling No. 1-15, September 21, 1934, AM-225, barred as misleading to the consumer age, maturity, or similar statements or representations as to neutral spirits. (J.A. I, 31A, 32A.) To the same effect were Misbranding Ruling No. 57, November 24, 1934, AM-275, p. 9; and Misbranding Ruling 64, November 24, 1934, AM-275, p.14 (J.A. I, 48A-50A). The same determination also appears in the Revised Regulations issued May 13, 1935. (J.A. I, 51A-55A.)

Misbranding Ruling No. 57 (J.A. I, 51A) explained in substance that in the view of the Administrators neutral spirits did not improve with age; hence, age representations as to such distilled spirits would be misleading to the consuming public.

Information as to the Administrator's determination in this regard was also disseminated to all bottlers of distilled spirits on February 28, 1936, by a circular, Publication No. FA-41. Again, on January 21, 1937 the same information was given to all bottlers of distilled spirits in a digest, Publication No. FA-91.

The determination challenged here, thus, goes back to the earliest days of the administration of the Act, following repeal of the Prohibition Amendment.

¹³ 13 F.R. 4927. " * * * The contents of the Federal Register shall be judicially noticed * * *." 44 U.S.C. 307.

At this 1948 legislative-type hearing, the entire Industry—including appellant—had full opportunity to present written data, views, arguments, etc., before the Secretary's delegates determined not to adopt the proposed change. No one in the Industry then supported the proposal to change the Regulation. No factual evidence was submitted by appellant or anyone else that neutral spirits improve by storage in wood. And no person testified affirmatively in support of the proposal.

Strong views were expressed against adoption of the proposal. One of the principal spokesmen for the Industry at the 1948 hearing was Mr. Howard Jones, representing the Distilled Spirits Institute, a Distillers Trade Association whose membership comprises a large proportion of the Distilling Industry, including appellant. Mr. Jones, speaking on behalf of the Institute, expressed the Institute's views "on the basis of what we feel is for the benefit of the purchasing public and the industry." In opposing Proposal No. 10, Mr. Jones stated that—

"no useful knowledge would be communicated to the purchaser by altering the present rule and allowing indirect reference to the age of neutral spirits, which is the substance of this proposal. Moreover, it would result in no useful knowledge being communicated to consumers but would give rise to competitive claims that would exaggerate the importance of a manufacturing process and confuse the purchasing public."¹⁴

This statement expressing the Industry's firm stand against adoption of the proposed change in the Regulation, was specifically endorsed by two representatives of the appellant, Mr. Frederick J. Lind and Mr. Thomas Wood. They asserted that the statement made by Mr. Howard Jones was the position then adhered to by appellant.¹⁵

Mr. Harry L. Lourie, representing the National Association of Alcoholic Beverage Importers, Inc., also ex-

¹⁴ J.A. II, 132A-133A.

¹⁵ Id., 136A, 137A.

pressed strong opposition to the proposal. He too agreed with Mr. Jones' statement.¹⁶ Mr. William M. Smith, representing Schenley Distilleries Corporation, also objected to the proposal.¹⁷

Mr. Joseph C. Haefelin, in Charge of Distillery Production for the American Distilling Company, stated¹⁸:

It is the position of our company that the adoption of this proposal [No. 10] would constitute a considerable departure from *the long established concept that [neutral] spirits do not improve with age.* [Emphasis and bracketed material supplied.]

He explained:

I should like to emphasize that the aging of neutral spirits *does not constitute aging in the same sense as the aging of whiskey.* In the aging of whiskey esterification proceeds through the action of the organic acids present in the higher alcohol. This develops aroma. There is a selective penetration through the fibers of the barrel of the various congeners of the whiskey. This reduces the concentration after aging of some of the original congeners and increases others. The charred surface of the barrel also absorbs some of the fusel oil.

The composition of neutral spirits is such that the whiskey aging process described above cannot function in the same manner since neutral spirits contains an infinitesimal quantity of congeners.

[Emphasis supplied.]

The 1948 proposal to amend the Regulation was not adopted.

Some eight years later, on October 31, 1956, there was published in the Federal Register¹⁹ a notice of public

¹⁶ Id., 133A-134A.

¹⁷ Id., 137A.

¹⁸ J.A. II, 134A-136A.

¹⁹ 21 F.R. 3321.

hearing to be held on November 25, and December 5, 1956, to consider various proposals to amend the Regulations relating to Labeling and Advertising Distilled Spirits (27 C.F.R., Part 5). Among the proposals included in that notice were the following:

24. To amend section 39(e)(5) (27 CFR 5.39(e)(5)) to permit truthful references of a general and informative nature relating to methods of production involving storage as to certain products, such as neutral spirits and gin, which are not entitled to bear age statements, provided they have been stored in oak containers for some specified minimum period, *e.g.*, three months.

30. To amend section 64(c) (27 CFR 5.64(c)) to permit truthful references of a general and informative nature relating to methods of production involving storage in advertisements for certain products, such as neutral spirits and gin, which are not entitled to bear age statements, provided they have been stored in oak containers for some specified minimum period, *e.g.*, three months.

At the 1956 legislative-type hearing, the entire Industry—including appellant—again had full opportunity to present written data, views, arguments, etc. Appellant did not then avail itself of this opportunity to present to the Administrators so much as appellant then had available of the very material appellant now seeks to present in a judicial trial *de novo* and *dehors* the administrative records.

Appellant's representative, Mr. Frederick J. Lind, then simply stated (in part)²⁰:

We know, and most distillers know, that aging in wood improves neutral spirits and gin. I am not a chemist, and in fact, I am not interested in the chemistry of whiskey. There is only one test in which I am interested, and that is the test of taste. I defy

²⁰ J.A. II, 154A-155A.

anyone to prove *to me* that aging neutral spirits or gin in wood does not improve it.

After all you should give us and other distillers some credit for intelligence. We certainly wouldn't put neutral spirits in wood and take the economic loss therefrom if we didn't think it was improving the product.

[Emphasis supplied.]

However, Mr. Lind offered no proof²¹ in support of his claim that aging in wood improves neutral spirits and gin.

Only one other industry representative, Mr. Leo Vernon, representing Publicker Industries, Inc., then favored the two proposals for changing the Regulation. He indicated that he favored these proposals only if they were made prospective in operation.²² Like Mr. Lind, he failed to file any substantive material in support of the two proposals.

These two proposals made at the 1956 hearing to change the Regulation were strongly opposed by most of the Industry: by Mr. Howard T. Jones, again representing the Distilled Spirits Institute;²³ by Mr. Briggs G. Simpich, representing the League of Distilled Spirits Rectifiers, Inc.;²⁴ by Mr. Harry L. Lourie, again speaking for the National Association of Alcoholic Beverage Importers, inc.;²⁵ by Mr. Frederic P. Lee, representing the Distillers

²¹ It is significant in this connection that as early as 1949 appellant inaugurated a study as to the effect on neutral spirits of storage in wood (J.A. I, 65). But the results of that study have never been disclosed to the Secretary of the Treasury's delegates, for their consideration. Appellant now states (Br. 7) that it began in 1958 to put aside "large quantities" of neutral spirits in barrels. This was, of course, with full knowledge that the making of any age claim or like representation was prohibited by the Regulation.

²² J.A. II, 156A.

²³ J.A. II, 146A-148A.

²⁴ Id., 148A-152A, 174A-178A.

²⁵ Id., 152A-154A.

Company, Ltd.;²⁶ by Mr. O. Norman Forrest, representing the National Distillers Products Corp.;²⁷ by Fleischman Distilling Corp.;²⁸ by Barton Distilling Company;²⁹ and by Schenley Industries, Inc.³⁰

The Distillers Company, Ltd., in its brief pointed out:³¹

* * * Lind [appellant's representative] did not attempt to prove by evidence that neutral spirits and gin improved by storage on wood. He merely defied everyone else to disprove his assertion. *The burden is on the proponents of the proposal, not others, and the absence not only of evidence, but even any offer of evidence to support the proposals is significant.* Lind did not claim that proof existed, merely that "we know, and most distillers know." If he knew, why was he unwilling to place his knowledge of record by evidence? * * * [Emphasis supplied.]

In its letter brief, the National Distillers Products Corporation stated:³²

We are concerned here with a proposal to change a regulation which has been in effect for more than twenty years and was adopted in order to prevent deception of the public as directed by the statute. Modification of the existing regulations of such long standing should not be made unless very compelling reasons are advanced with assurance that deception of the public would not result. No such reasons or assurances were presented at the hearing. On the contrary, the evidence showed that under various sections of the present regulations as they have ex-

²⁶ Id., 157A-165A, 180A-196A.

²⁷ Id., 165A, 197A-199A.

²⁸ Id., 200A.

²⁹ Id., 201A-206A.

³⁰ Id., 173A.

³¹ Id., 189A.

³² Id., 198A-199A.

isted for years, the consuming public has come to understand that the aging or storage of distilled spirits in wood effects a change in the character and quality of the product which improves its acceptability by the public. The proposals, if adopted, would lead the public to believe that a product which is prohibited from making a claim of age has been improved through a process of aging—a result which would not only confuse the public but deceive them in direct contravention of the basic statute under which the regulation was issued.

If it should be argued that the retention of neutral spirits and gin in wooden containers for any length of time effects a change in the products, then the neutral quality of the products has been destroyed and they are no longer available under the present standards of identity for bottling as gin or for use as neutral spirits in the manufacture of blended whiskey. Such a condition would make necessary the creation of new standards of identity for the products, a matter which was not included within the scope of the notice of hearing.

There was no factual evidence introduced at the hearing of November 23, 1956 bearing upon what if any change in the character of the products was effected by the retention for any period or periods of time in wood, and we are disappointed at the failure of the Government to place its chemist on the stand for interrogation as requested by industry representatives opposed to the suggested proposals. * * *

[Emphasis supplied.]

At the hearing, Mr. Howard Jones, speaking on behalf of Distilled Spirits Institute, observed:³³

These products [neutral spirits and gin] traditionally have been prohibited from claiming age for the reason that no conclusive data is available that such products do age, or that they improve with storage in oak containers.

³³ J.A. II, 147A-148A.

We recognize that this proposal refers only to "references of a general and informative nature," and understand that it does not contemplate statements of specific age nor statements that the products have been stored in wood for a specific period of time. Presumably a statement such as "stored in wood" would be permitted.

If there is any single fact with reference to the production and storage of distilled spirits which is more commonly known to the consumer than any other, it is that certain products are aged by storage in wood containers. To the consumer, storage in wood is synonymous with age.

It cannot be disputed that a statement on the label of a blended whiskey to the effect that the neutral spirit content was "stored in wood" might be a factual and truthful statement. There are many examples in FAA regulations, however, wherein the truthfulness or falsity of a statement is not the only criteria. *The philosophy of the Act is firmly grounded on the prevention of consumer deception. We believe that the simple statement "stored in wood" on the label of any product not entitled to claim age is deceptive in the extreme.* [Emphasis and bracketed material supplied.]

Mr. Frederick P. Lee, speaking for the Distillers Company, Ltd.,³⁴ reviewed the history of the matter, going back to the earliest determinations by the Treasury Department that such statements would be misleading to the consumer. He referred to the Treasury Department's duty "to prohibit, irrespective of falsity—that means even though they may be true—statements relating to age or manufacturing processes that the Secretary finds likely to mislead the consumer." And he went on to say:

I mentioned that you are [considering] reversing a policy that was long ago established. I think perhaps just a word on that is worth your consideration because it is a policy you have repeated and affirmed

³⁴J.A. 159A-163A.

and even as recently as eight years ago reconsidered and still maintained your position and has anything happened since then that should cause an alteration of that [reaffirmation]? * * *

* * *

I examined the transcript of that [1948] hearing. At that time no industry member supported the proposal * * *.

Mr. Jones stated that the adoption of any such proposal would communicate no useful knowledge to purchasers and would result in competitive claims that would exaggerate the importance of a manufacturing process and confuse the purchasing public.

* * *

There was no evidence offered that neutral spirits improved by being stored in wood, just as so far in the progress of this hearing, there has been no such evidence. * * *

I think your conclusion upon that record, as I think the conclusion will be from this record, that the great bulk of the industry opposed this change in the regulatory policy, there was no evidence offered to support such a change, and, in any event, the Secretary did not adopt this proposal.

If you place neutral spirits in wood, I suggest to you that at that moment the neutral spirits are no longer neutral and are no longer entitled to be characterized as neutral spirits, and you would have no claim as to maturing neutral spirits.

They cease to be that, and I make that point seriously.

In the case of Vodka, you have already ruled that if Vodka so much as absorbs color from wood, it changes character and is no longer Vodka and cannot be so called, but has to have a fanciful name.

* * *

* * * This proposal would * * * [overturn] a regulation that has been in effect twenty-two years, and it * * * [would do so] so far as the 1948 record is

concerned, and as far as this record is concerned—
 * * * without any newly disclosed facts or data that
 would justify a statement that * * * [placing] such
 products as neutral spirits and gin in wood improves
 their quality, so that the statement would not be mis-
 leading to the consumer.

*Adoption of these proposals would promote con-
 sumer deception, in our judgment, by misleading ref-
 erences to age and to manufacturing processes, and
 it would involve adoption of a regulation which is
 contrary to the statutory standard against such mis-
 leading age and manufacturing process statements.
 It is a statutory standard, we believe, that binds the
 adoption of regulations in this field, the adoption of
 the proposals that also force industry competition on
 the low level of misleading labeling in advertising—
 and I believe * * * the adoption of these proposals
 would give a temporary advantage to producers hav-
 ing inventories of gin or Vodka stored in reused
 barrels.*

Mr. Vernon recognized that when he limited his
 support to prospective adoption * * *.

[Emphasis and bracketed material supplied.]

In its brief, the Distillers Company, Ltd., further repre-
 sented:³⁵

The present regulation prohibiting as misleading
 age, maturity, or similar representations as to neu-
 tral spirits, gin, and vodka was adopted twenty years
 ago in 1936 after appropriate statutory hearings. It
 has remained unchanged since. The consumer knows
 that age is not stated for neutral spirits, gin, and
 vodka even though he does not know the scientific and
 statutory basis for the prohibition of age statements
 for such products.

During this twenty year period the matter was
 reconsidered at length by the Secretary and the pres-
 ent regulation retained without change. This oc-
 curred eight years ago when in 1948 a proposal (13
 F.R. 4927) was set for hearing. * * *

³⁵ J.A. 190A-191A.

This was Proposal No. 10, in the 1948 proceedings as set out *supra*, p. 9.

The brief went on:

This 1948 proposal is practically the same as the present proposals except that the present proposals extend to gin, vodka, and other items, as well as neutral spirits, and would reduce the minimum storage period from six months to three months.

The transcript and exhibits of the 1948 hearing show that—

a. No industry member affirmatively supported the proposals.

b. The Distilled Spirits Institute, then as now, opposed the proposal. Mr. Jones stated that by its adoption no useful knowledge would be communicated to the purchasers and the adoption would result in competitive claims that would exaggerate the importance of a manufacturing process and confuse the purchasing public.

c. The National Association of Alcoholic Beverage Importers, then as now, opposed the proposal. Mr. Lourie stated that the proposal was bound to cause trouble and would result in competitive labeling and advertising.

d. The American Distilling Company, while it neither opposed nor supported the proposal, stated that if the proposal were adopted it should include storage in ventilated metal tanks, as well as in oak barrels. Storage of neutral spirits in such tanks made a softer spirit than storage in oak barrels. Further, neutral spirits stored in reused whisky barrels take on a slight whisky character without noticeably softening the spirits themselves.

e. There was no evidence offered that neutral spirits improved by storage in wood.

The 1948 proposal was not adopted. Now again, after eight more years, the proposal is revived without any additional factual basis for its revival.

It is an imposition on both the Secretary and the industry again to set such a proposal for hearing

when proponents are not in a position to offer evidence that neutral spirits, gin, and vodka do improve with storage in wood. It is an abuse by them of the administrative processes, an attempt to force a change on bases other than considerations legally appropriate.

The 1956 proposals to change the Regulation so as to permit label statements to be made, such as appellant here seeks to compel by court order, were not adopted.

Since the close of the 1956 legislative-type hearing, appellant has not petitioned the Secretary of the Treasury's delegates to hold a further hearing to consider amending the Regulation.³⁶ Nor has appellant placed before the Secretary of the Treasury's delegates the material it has here sought to adduce in a judicial trial *de novo*, and *dehors* the certified administrative record. Accordingly, the Secretary of the Treasury's delegates have had no opportunity to consider this material. And of course, no other interested parties in the Industry have been furnished notice, and an opportunity at a legislative-type rule-making hearing to present their views and material pertinent to any proposed change in the Regulation, as required by the statute.

B. Denial of Appellant's Application for Label Approval

Appellant filed an application for certificate of label approval for its "Calvert Extra" blended whiskey on December 26, 1962,³⁷ and again on January 25, 1963.³⁸ The proposed label contained this wording:

Calvert Extra was begun years ago when these
[grain neutral] spirits * * * were put aside. The
grain neutral spirits in this product contribute a

³⁶ J.A. II, 109A. It is to be noted that section 4(d), Administrative Procedure Act, 5 U.S.C. 1003(d), requires each Agency to accord any interested person the right to petition for amendment of a regulation.

³⁷ J.A. II, 112A-114A.

³⁸ J.A. I, 21A-23A.

unique, delightful taste of their own, the result of a special distillation process and of storage for at least four years in specially selected used cooperage—barrels which were previously used for aging our fine whiskies. [Bracketed material supplied.]

These applications were denied by the Secretary of the Treasury's delegates on the ground that this wording contravenes the provision in 27 C.F.R. 5.39(d) that—

Age, maturity, or similar statements or representations as to neutral spirits * * * are misleading and are prohibited from being stated on any label.

Appellant was informed in the notices of denial that this wording would have to be deleted from the label to conform with the Regulation. The second denial was dated January 28, 1963.

On February 8, 1963 appellant submitted an amended application for certificate of label approval, deleting the wording which the Secretary of the Treasury's delegates had determined to be in violation of the Regulation.³⁹ This amended application was approved February 11, 1963.⁴⁰

In its complaint, appellant alleged that the wording originally in its label, which the Secretary of the Treasury's delegates had required to be deleted, did not contravene the Regulation.⁴¹ The District Court in its memorandum opinion concluded that this wording did violate the Regulation.⁴²

Appellant has now raised the claim (Br. 24) that it "had no opportunity to present evidence on its application at the administrative level." As noted, appellant has been free at all times to petition the Secretary of the

³⁹ J.A. I, 25A-26A.

⁴⁰ Appellant disclosed at the argument before the District Court that it is currently marketing its "Calvert Extra" blended whiskey under this certificate of label approval, with a blank in the label at the place where the deleted "stored-in-wood" claim had originally appeared.

⁴¹ J.A. I, 12A-13A, §13.

⁴² J.A. I, 90A.

Treasury's delegates for amendment of the Regulation, and to submit whatever material it desired to have considered in that connection; but appellant has never undertaken to do so. See fn. 36, *supra*.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of Section 5 of the Federal Alcohol Administration Act of August 29, 1935, 49 Stat. 981 (1935), as amended, 27 U.S.C. § 205 (1959); Section 4(b) and (d) of the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. § 1003(b) and (d); and the relevant administrative regulations thereunder, 27 C.F.R. Part 5 (1961), are set forth in the Appendix to this brief.

SUMMARY OF ARGUMENT

Appellant's attempt to obtain a factual hearing in the District Court amounted to a collateral attack upon the Distilled Spirits Regulations dealing with "age claims" for neutral spirits which have been determined to be misleading to the consumer. Appellant participated in the original rule-making proceedings in 1936, and in proceedings in 1948 and 1956, during which proposals to amend the "age claim" regulation were considered and rejected. The consensus of the Industry was opposed to such amendment, (unanimously, including appellant in 1948, and with only two dissents in 1956, appellant and one other).

Despite full knowledge that it was flying in the face of the "age claim" regulation appellant undertook a program calculated to market its "Calvert Extra" blended whiskey with an "age claim" in the label. Now "disappointed" at Government appellees' refusal to approve the label, appellant submitted factual material to the District Court in support of its "age claim" in the proposed label. Appellant has never (either in the 1948 or 1956 hearings or in a petition to amend the "age claim" regulation) submitted

this material or any other data in support of its contention to the Administrators for their consideration.

Accordingly, the attempt to obtain a *de novo* judicial hearing in the District Court violates the doctrine of exhaustion of administrative remedy, and seeks to have the courts usurp the administrative function.

The award of summary judgment to appellees, and the striking of appellant's affidavits and exhibits, which were *dehors* the certified administrative records, was therefore proper under the principle enunciated in *National Broadcasting Company v. United States*, 319 U.S. 190 (1943), and cases cited therein, and recently restated in *United States v. Carlos Bianchi & Co.*, 373 U.S. 709 (1963).

ARGUMENT

Summary judgment was correctly granted in appellees' favor; appellant was not entitled to any judicial trial *de novo* in connection with its collateral attack on the Distilled Spirits Labeling Regulation.

This is in substance a collateral attack by appellant on the Distilled Spirits Labeling Regulation.⁴³

⁴³ Appellant has virtually abandoned its claim that the wording required to be deleted from its proposed "Calvert Extra" label does not contravene the Regulation, 27 C.F.R. 5.39(d), which prohibits "age, maturity, or similar statements or representations as to neutral spirits" from being stated on any label. (Br. 12, fn. 5.) The statement on the proposed label that the grain neutral spirits in the product "were put aside years ago" and "stored * * * for at least four years" in used cooperage "previously used for aging our fine whiskies" clearly violates the Regulation. The District Court so found as a matter of law.

"Age" is defined to mean the storage of distilled spirits, after distillation and before bottling, in oak containers. 27 C.F.R. 5.10(j). Appellants' representatives have referred to appellant's storage of neutral spirits in whiskey barrels as "aging" such spirits. (J.A. II, 102A, 3d par.; 154A-155A.) And the transcript and briefs of the 1948 and 1956 legislative-type hearings held by the Secretary's delegates show very clearly that all participating in those hearings understood the change in the Regulation was proposed in order to allow "age, maturity, or similar statements or representations", such as those on appellant's proposed label, to be made without violating the Regulation. See page 17, *supra*.

The challenged Regulation was issued by the Secretary of the Treasury's delegates in 1936 after a legislative-type rule-making hearing, such as the Act prescribes. The Secretary's delegates promulgated the Regulation on a finding that "age, maturity, or similar statements or representations as to neutral spirits" are misleading to the consuming public. This Regulation was adopted in full accord with the Act which requires that the Secretary prohibit—irrespective of truth or falsity—such statements "relating to age" as *he* finds likely to mislead the consumer. No dissent was voiced as to that legislative-type finding at the 1935 statutory hearing. And this legislative-type finding was made with the full consensus of the Distilled Spirits Industry.

Twice thereafter, in 1948 and again in 1956, the Secretary's delegates held similar legislative-type hearings, as required by the statute, to consider whether the Regulation should be amended so as to permit the very kind of statements as to storage in oak containers, to appear on distilled spirits bottle labels, which appellant here seeks to have directed by court order. At such legislative-type hearings, all interested parties—including appellant—were afforded full opportunity to participate in the rule-making process through submission of whatever written data, views, arguments, etc., they desired to have considered. The Secretary's delegates determined to make no change in the Regulation.

The consensus expressed at the 1948 statutory hearing by the Industry spokesmen was again fully in accord with the legislative-type finding incorporated into the 1936 Regulation.

A like full consensus did not prevail at the 1956 legislative-type hearing. However, only two members of the Industry favored changing the Regulation. One was appellant. Neither offered any proof to support their change of view in respect of the long-standing Regulation. And the great weight of Industry opinion continued to be in full accord with the 1936 Regulation. Those who opposed

changing the Regulation advanced very cogent representations.

All the certified administrative records of the legislative-type hearings relating to the Regulation were placed before the District Court for judicial review purposes. Those records fully advised the Court "of the considerations which caused the administrative agency" originally to issue the challenged Regulation in 1936, and then in 1948 and again in 1956 to determine that no change should be made in it. See *Continental Distilling Corp. v. Humphrey*, 101 U.S. App. D.C. 210, 212, 247 F.2d 796, 798 (1957) (fn.2).

Appellant had full opportunity to present to the Secretary's delegates the very written data, views, arguments, etc., it sought to present *dehors* the administrative record to the District Court in this litigation. Yet, appellant failed to submit so much of such material as it had available at the time of the legislative-type hearings held to consider changing the outstanding Regulation. And to date it has also failed to submit so much of such material as it acquired thereafter, for consideration by the Secretary's delegates. No record appears as to any petition for amendment to the outstanding Regulation, which appellant could have submitted under Section 4(d) of the Administrative Procedure Act, 5 U.S.C. 1003(d). And no reason appears why appellant has utterly failed to follow proper administrative procedure and exhaust its administrative remedies before bringing this litigation.⁴⁴

Accordingly, we believe, appellant's attempt to proffer materials in a judicial trial *de novo* and *dehors* the administrative records—which it could have presented to the Secretary's delegates but did not—grossly violates the settled principles of orderly and proper agency-court relations embodied in the doctrine of exhaustion of admin-

⁴⁴ It is to be noted that when appellant committed itself to a program of storing neutral spirits in wood, and absorbing the economic loss therefrom, it acted with full knowledge it was doing so in the teeth of the outstanding Regulation, assuming it then intended to make any claim as to "storage in wood."

istrative remedies. *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492, 500-501 (1955); *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952); *Unemployment Compensation Commission, etc. v. Aragon*, 329 U.S. 143, 155 (1946).

There is an even more fundamental vice in appellant's efforts to obtain its own private rule-making hearing by judicial trial *de novo* before the District Court. In effect, appellant is seeking to have the courts exercise the very judgment which the Act confers responsibility on the Secretary to make. Appellant would want the District Court to usurp the Agency's function.^{44a} Cf. *American Tel. and Tel. Co., v. United States*, 299 U.S. 232, 236-237 (1936).

Since the legislative-type hearing records disclose a reasonable basis for the action of the Secretary's delegates in promulgating, and thereafter determining to make no change in, the outstanding Regulation, this case is clearly governed by the principle enunciated in *National Broadcasting Co. v. United States*, 319 U.S. 190, 224-227 (1943), affirming Judge Learned Hand's opinions in 44 F.Supp. 688, 690 (S.D.N.Y. 1942) and 47 F.Supp. 940, 946-947 (S.D.N.Y. 1942) (Three-Judge Court); *Tagg*

^{44a} At any future legislative-type hearing looking to possible amendment of the outstanding Regulation, the Secretary's delegates would have to apply their judgment and administrative expertise in a number of important respects, relative to the actual effect, if any, storage in reused whiskey barrels has on neutral spirits: *E.g.* (1) To what extent, if any, do such neutral spirits change as a result of absorption of whiskey characteristics from the whiskey-soaked barrel? (See *supra* p. 19.) (2) To what extent, if any, do chemical changes occur in the stored neutral spirits, such as occur in the aging of whiskey? (See *supra* p. 11.) (3) If it is found that the effect of such storage is significant in either of these respects, should a new and different standard of identity and designation be prescribed, in the consumer's interest, for such changed neutral spirits, to distinguish them from truly neutral spirits? (See *supra* pp. 15, 17.) (4) Are such changes, if any, sufficiently like those occurring in the aging of whiskey, so that an "age claim" made with respect to them would not mislead (or be likely to mislead) the consumer, or are the changes, if any, resulting from such storage so insignificant that a labeling reference thereto would mislead (or be likely to mislead) the consumer into believing that some substantial change had occurred? (See *supra* pp. 10, 16.)

Bros. & Moorehead v. United States, 280 U.S. 420, 442-443 (1930); *Acker v. United States*, 298 U.S. 426, 434 (1936).

In the *National Broadcasting Company* case, Judge Learned Hand declined to conduct a judicial trial *de novo* and receive evidence *dehors* the administrative record of the legislative-type regulatory hearing held by the Federal Communications Commission. He stated (47 F.Supp. at 946-947) :

* * * The industry at large holds conflicting views
* * *. Each side has stated its reasons and the
Commission has chosen. * * *

* * * [If] the evidence [proffered *dehors* the administrative record] went to contradict or overthrow the findings, we could not bring it into hotchpot with the evidence taken by the Commission, without deciding the issues in the first instance ourselves. We have no such power; it would upset the whole underlying scheme of an expert commission, whose orders must stand or fall upon such evidence as it had before it. *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420 * * *; *Acker v. United States*, 298 U.S. 426 * * *. If an aggrieved party wishes to supplement that evidence he must apply to the Commission itself * * *.
[Bracketed material supplied.]

Mr. Justice Frankfurter, writing for the Supreme Court, stated (319 U.S. at 227) :

* * * The District Court, by granting the Government's motion for summary judgment, disposed of the case upon the pleadings and the record made before the Commission. *The Court below correctly held that its inquiry was limited to review of the evidence before the Commission.* Trial *de novo* of the matters heard by the Commission and dealt with in its Report would have been improper. See *Tagg Bros. v. United States*, 280 U.S. 420; *Acker v. United States*, 298 U.S. 426.⁴⁵ [Emphasis supplied.]

⁴⁵ Appellant's attempted distinguishment of *National Broadcasting* (Br. 19-21) is unavailing. Appellant's contention that it is not challenging the Regulation simply does not bear analysis. Appellant

In the *Tagg Bros.* case, Mr. Justice Brandeis similarly declared that as to any evidence not brought to the Secretary's attention during the administrative proceedings, "the appropriate remedy is to apply for a rehearing before him or to institute new proceedings [before the Secretary]. He has the power and the duty to modify his order if new evidence warrants the change." 280 U.S. at 444-445.

Recently, the Supreme Court restated the proper rule in *United States v. Carlos Bianchi & Co.*, 373 U.S. 709, 715 (1963), as follows:

* * * [I]n cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no *de novo* proceedings may be held. *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420; *National Broadcasting Co.*, 319 U.S. 190, 227. And, of course, as shown by the *Tagg Bros.* and *NBC* cases themselves, the function of reviewing an administrative decision can be and frequently is performed by a court of original jurisdiction as well as by an appellate tribunal.

That is the rule for which we contend here.⁴⁶

is clearly making a collateral attack on the Regulation. Summary judgment was appropriate in *National Broadcasting*, and is equally appropriate here.

As for appellant's claim that it "had no opportunity to present evidence upon its application at the administrative level" (Br. 24), that claim is also without foundation. As we have developed (*supra*, p. 25), appellant has been free to submit its evidence to the Secretary's delegates, and seek amendment to the Regulation. But it has never done so.

⁴⁶ Appellant's heavy reliance (Br. 13-16) on *Continental Distilling Corp. v. Humphrey*, 95 U.S. App. D.C. 104, 220 F.2d 367 (1954) and 101 U.S. App. D.C. 210, 247 F.2d 796 (1957), is misplaced. *First*. *Continental Distilling* involved alleged invidious discrimination between Canadian and certain American whiskey, claimed to be the same in quality. Here, no such allegation is made. Indeed, it is apparent that all neutral spirits are treated alike by Government appellees, and that it is appellant which seeks an invidious preferment in the market over its competitors. *Second*. *Continental Distilling* is

Judicial review here being properly confined to the administrative records, without any judicial trial *de novo*, the conclusion readily follows that the District Court correctly granted summary judgment in appellees' favor. The following judicial review principles are well settled:

Where a matter involves conflicting considerations calling for application of the Agency's familiarity with the problems of the Industry subject to its regulation, the courts will consider the Agency's exercise of its expertise in the field a weighty factor supporting its regulatory action. *American Trucking Associations, Inc. v. United States*, 344 U.S. 298, 314 (1953). Particularly in such circumstances, it is no valid objection to the regulation that experts might disagree over the particular choice made by the Agency. *Mitchell v. Budd*, 350 U.S. 473, 480, *reh. denied*, 351 U.S. 934 (1956). Nor under such circumstances will the courts substitute their judgment for that of the Agency charged with responsibility under the statute. *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 227 (1943); *Continental Distilling*

inapposite because the case was disposed of by the District Court without the certified administrative records, upon Continental's claim it was not challenging the validity of the reused cooperage regulation, as such. The Court of Appeals noted that, because of the absence of the administrative hearing records, the Court was "not advised of the considerations which caused the administrative agency" to issue the regulation. 101 U.S. App. D.C. at 212, 247 F.2d at 798, fn. 2.

For the latter reason, *Armour & Co. v. Freeman*, 113 U.S. App. D.C. 37, 304 F.2d 404, *cert. denied*, 370 U.S. 920 (1962), on which appellant also relies (Br. 17), is likewise inapposite. The case was presented in the District Court without the certified administrative records. This was carefully pointed out by the Court of Appeals. See 113 U.S. App. D.C. at 39, 309 F.2d at 406. Also see Chief Judge Miller's separate opinion, 113 U.S. App. D.C. at 40, 304 F.2d at 407. The Court of Appeals was concerned there with the preliminary injunction phase of the case, and did not address itself to the question whether summary judgment on the administrative records, or judicial trial *de novo*, was the proper course for disposition on the merits.

We do not overlook the other cases appellant cites. (Br. 16, 18-19). We think none of these other cases helps appellant here either.

Corp. v. Humphrey, supra, 95 U.S. App. D.C. at 109, 220 F.2d at 372; *Gibson Wine Co. v. Snyder*, 90 U.S. App. D.C. 135, 140, 194 F.2d 329, 334 (1952). It is enough that the Agency's choice, adapted to accomplishment of the statutory end, is one that a rational person could reasonably have made. *Federal Security Administrator v. Quaker Oats, Co., supra*, 318 U.S. at 233; *Willapoint Oysters v. Ewing*, 174 F.2d 676, 695 (9th Cir. 1949).

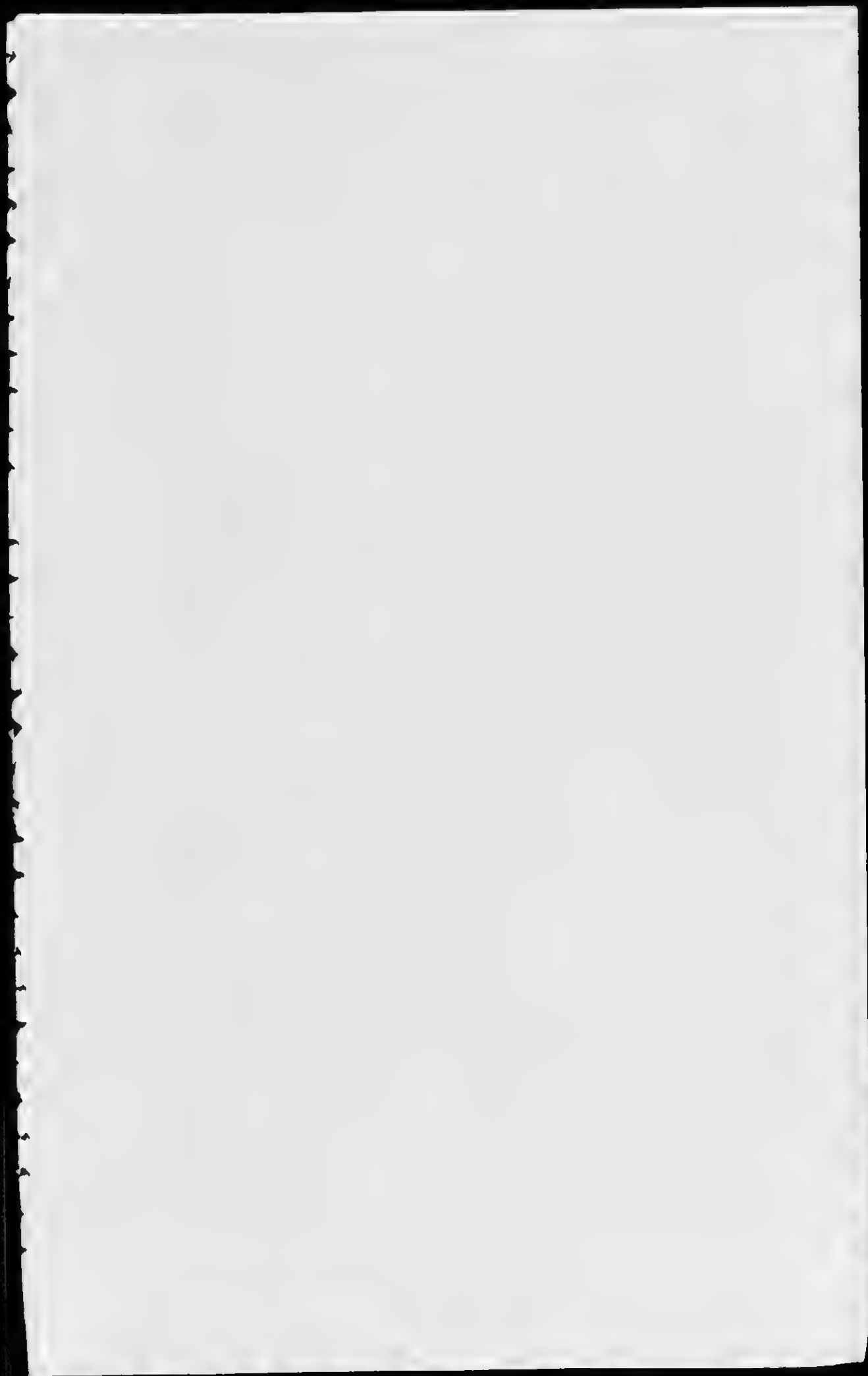
Since the Act makes the determination involved here the responsibility of the Secretary of the Treasury, not the courts; since the Secretary must make the necessary determination after a legislative-type rule-making hearing at which *all* interested persons have had an opportunity to be heard; and since the Secretary's determination requires application of his expertise in the Distilled Spirits regulatory field, in light of the representations made and materials submitted by all these interested persons, appellant is clearly in the wrong forum.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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APPENDIX

APPENDIX

PERTINENT PROVISIONS OF THE
STATUTES AND REGULATIONS INVOLVED

Federal Alcohol Administration Act, 27 U.S.C.

§ 205. Unfair competition and unlawful practices.

It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

* * * *

(e) *Labeling.* To sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or to receive therein, or to remove from customs custody for consumption, any distilled spirits, wine, or malt beverages in bottles, unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding, and labeling and size and fill of container (1) as will prohibit deception of the consumer with respect to such products or the quantity thereof and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guarantees, and scientific or irrelevant matters as the Secretary of the Treasury finds to be likely to mislead the consumer; (2) as will provide the consumer with adequate information as to the identity and quality of the products, * * * (3) as will require an accurate statement, in the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification, if neutral spirits have been used in the production thereof, informing the consumer of the percentage of neutral spirits so used and of the name of the commodity from which such neutral spirits have been distilled, or in case of neutral spirits or of gin produced by a process of contin-

uous distillation, the name of the commodity from which distilled; (4) as will prohibit statements on the label that are disparaging of a competitor's products or are false, misleading, obscene, or indecent;
* * *

* * * The District Court of the United States, and the United States court for any Territory shall have jurisdiction of suits to enjoin, annul, or suspend in whole or in part any final action by the Secretary upon any application under this subsection; * * *

✓ The Secretary of the Treasury shall give reasonable public notice, and afford to interested parties opportunity for hearing, prior to prescribing regulations to carry out the provisions of this section.

Administrative Procedure Act, 5 U.S.C. 1003 (b):

After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. * * *

Administrative Procedure Act, 5 U.S.C. 1003 (d):

Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

Title 27 C.F.R. § 5.10 (j):

(j) *Age*. "Age" means the period during which, after distillation and before bottling, distilled spirits have been kept in oak containers * * *

Title 27 C.F.R. § 5.21 (a) and (b):

§ 5.21 *The standards of identity*. Standards of identity for the several classes and types of distilled spirits set forth in this part shall be as follows:

(a) *Class 1; Neutral spirits or alcohol.* "Neutral spirits" or "alcohol" are distilled spirits distilled from any material at or above 190° proof, whether or not such proof is subsequently reduced.

(1) "Vodka" is neutral spirits distilled from any material at or above 190° proof, * * *

(b) *Class 2; Whisky.* "Whisky" is an alcoholic distillate from a fermented mash of grain distilled at less than 190° proof in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to whisky, * * *

* * * *

(2) "Straight whisky" is an alcoholic distillate from a fermented mash of grain distilled at not exceeding 160° proof, * * *

* * * *

(7) "Blended whisky" (whisky—a blend) is a mixture which contains at least 20 percent by volume of 100° proof straight whisky and, separately or in combination, whisky or neutral spirits, * * *

Title 27 C.F.R. § 5.39(d) and (e):

§ 5.39 *Statements of age and percentage.*

* * * *

(d) *Other distilled spirits.* Age, maturity, or similar statements or representations as to neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs, bitters, and specialties are misleading and are prohibited from being stated on any label.

(e) *Miscellaneous age representations.*

* * * *

(5) * * * Age, maturity or similar representations as to neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs, and bitters, are misleading, and shall not appear upon any label, * * *



United States Court of Appeals
for the District of Columbia Circuit

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

FILED MAR 15 1965

Nathan J. Paulson
CLERK

No. 18,465

JOSEPH E. SEAGRAM & SONS, INC.,

Appellant,

against

HONORABLE DOUGLAS DILLON, ET AL.,

Appellees.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**ANSWER OF JOSEPH E. SEAGRAM & SONS, INC.,
TO GOVERNMENT APPELLEES' PETITION
FOR REHEARING**

⁴⁴
Appellees' 64 page petition fails to point out any facts or authorities which were overlooked by this Court in its opinion. Appellees characterize this Court's opinion as "aberrant" (GP 50)* and make the same arguments as before.
³⁵

Appellees persist in their effort to change the character of this proceeding from one involving review of appellees' disapproval of a particular application for label approval into a proceeding to change or amend appellees' regulations. Appellees do not want to consider Seagram's application for label approval on its facts; they do not want to decide whether this label is true and informative as Seagram maintains and above all, they do not want Court review of such a determination.

* GP refers to Government Appellees' Petition For Rehearing.

This Court correctly rejected these contentions and held:

“Considerable confusion has crept into this controversy by way of discussion of the rule-making by which the Regulation was promulgated, the power of rule-making, the scope of the rule promulgated, and such matters. Appellees say that statements submitted to the Secretary at various times opposing amendment of the Regulation compose a record to which the review by the District Court is limited. But the Act does not require that this Regulation be made ‘on the record’, and the Regulation was not derived from findings based upon evidence in a record. It may or may not be that under the doctrine of such cases as *Columbia Broadcasting* a civil action would lie to review and set aside the Regulation as such; and it may or may not be that the statements submitted in the course of hearings called to consider possible amendments to the Regulation would be held to compose a ‘record’ for review purposes. But we do not have such a case. The target of Seagram’s complaint is the Secretary’s refusal to approve a specific label. This is the core of the controversy. Seagram does not attack the Regulation in *vacuo* or *pro bono publico*. It says its label should be approved. It proffers facts and then a series of legal contentions, in the course of which it reaches the argument that if the Regulation means its label may be rejected the Regulation is invalid. This is the normal course of such disputes. The point upon which the proceeding devolves is the approval *vel non* of this label.” (pp. 5-6 Slip Opinion)

Appellees’ petition abounds with exposition of abstract legal principles and lengthy quotations from a myriad of cases in varying contexts directed to the standard whereby the actions of an administrative body are to be judged and measured. But this Court’s decision did not touch upon or in any way affect such standards. It did not intrude into the “sphere of competence” of the Secretary of the Treas-

ury. The decision merely provided a procedure whereby the facts could be ascertained and upon which the administrator's acts could eventually be measured against the applicable statutory standard. "[A] legal point can hardly be said to be presented if the facts upon which it is premised are not presented." (Slip Opinion, p. 4.)

Appellees ignore the unique statutory framework and anomalous administrative procedure in which appellant Seagram found itself and through which it sought relief. There was no hearing on the application, since the statute did not so provide (Slip Opinion, pp. 2-3), and consequently no record was there made upon which the administrator's acts could be judged. Nor was there a record incorporating findings of fact supporting the regulation in question. (Slip Opinion, p. 5) Appellees fail to suggest where this Court erred in recognizing that this procedure violated the fundamental right of Seagram "to present somewhere sometime the evidence which it said established that its label should be approved." (Slip Opinion, p. 4)

By ignoring these facts appellees, in the name of "separation of powers" and "rule of law" would place both the administrative rule-making and adjudicatory powers beyond the pale of judicial sanction, and would make the Secretary's administrative action not subject to question. Those aggrieved would be totally without means to seek relief from action which, for all that appears of record, has no basis in law or fact. "Separation of powers" when carried to the extremes suggested by Appellees would not only nullify the specific statutory provision in this case for judicial review (27 U. S. C. § 205(e)) but would be inconsistent with our Constitutional system of checks and balances, the very basis for separating the powers of the three branches of Government.

While there is nothing new in appellees' petition, it is alarming to note their brazen announcement of how they

intend to frustrate the decision of this Court. While appellees state:

“We have no objection to the Secretary’s delegate entertaining such a petition for reconsideration [of the application for label approval]” (GP 12)
8

they blatantly state:

“... We fully concur that it would then be up to the Secretary to act in accordance with law and to take proper action in the matter within the sphere of his administrative competence. And we *assume* that such action extends to *sua sponte* treating the application as warranting the conduct of legislative rule-making proceedings to consider appropriate amendments to the Labeling Regulations, *and the holding in abeyance of any adjudicatory action on the application for label approval pending the outcome of such rule-making proceedings.*” (Emphasis added. GP 12-13)
8-9

Thus appellees have no intention, even in light of the Court’s opinion, of giving Seagram a hearing on *this* application for *this* whiskey. Instead, they will turn the application by Seagram for the approval of a particular label into an industry free-for-all as to whether appellees’ set of regulations should be amended. Appellees imply that “no matter what evidentiary materials Seagram may present” 21 (GP 30) they will not approve the label without first changing their regulations. Appellees ignore Seagram’s allegation that each passing day it is suffering large monetary damages by not being permitted to make true and informative statements on its label, and state that they intend to hold up action on this application for label approval pending “the outcome of rule-making proceedings”. (GP 12)
8

Appellees should be admonished to abide by this court's direction to hear the facts as to this application, and then decide whether it should be approved. Appellees are qualified to evaluate the evidence presented to show that the proposed statement is true and informative without a caucus of industry competitors and without legislative-type hearings.

If upon consideration of the facts as to this particular label appellees find that the proposed statements are true and informative and not misleading and therefore that the application should be approved, they can consider what action, if any, should be taken with reference to their general regulation. Appellees may decide that approving a label containing such a statement is consistent with their regulation as it now reads and that no action is necessary. They may decide that in view of the unique facts here presented the application of the regulation in this case should be waived. They may decide that in view of the facts here presented it is desirable to modify their regulation and hold hearings as to how it should be modified. The first step, however, is a prompt disposition of Scagram's application for approval of its label and a prompt factual determination of whether its proposed statements are true and informative.

If appellees find that the proposed statement is false, misleading or deceptive they can disapprove the application for label approval and appellant can seek the review provided by the statute in the District Court (27 U. S. C. § 205(e)). This is the orderly procedure outlined by this court. There is no showing of any basis for a rehearing or reconsideration of this decision.

Government Appellees' Petition should be denied.

Dated: February 22, 1965

Respectfully submitted,

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 18,465

FILED FEB 18 1965

JOSEPH E. SEAGRAM & SONS, INC.,

v.

HONORABLE DOUGLAS DILLON, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**ANSWER OF JOSEPH E. SEAGRAM & SONS, INC.
TO PETITION FOR REHEARING EN BANC**

The Intervenors in this proceeding, and not the Secretary, seek an *en banc* review of the unanimous decision of Senior Circuit Judges Edgerton and Prettyman and Circuit Judge Burger which *affirmed* the decision of the District Court granting the Intervenors' and the Secretary's motions for summary judgment because this Court made provision for further proceedings before the Secretary.

Seagram filed an application with the Secretary for approval of a label for its new whiskey, Calvert Extra. The label contained a statement with reference to the neutral spirits used in Calvert Extra which Seagram maintains was not only true and not misleading but was informative to the consumer. The Secretary denied the application pursuant to statutory authority given him to prevent con-

sumer deception by prohibiting the making of false or misleading statements on labels (27 U. S. C. § 205(e)). No evidence whatever was before the Secretary with reference to whether the statement in question was true and not misleading as to the neutral spirits used in Calvert Extra since there was no provision in the Secretary's regulations for the proffer of such evidence. (See p. 3 Slip Opinion)

Pursuant to the Act, Seagram sought review of the Secretary's action in the District Court. The District Court permitted three of Seagram's competitors to intervene in the proceeding and then granted motions for summary judgment made by the intervenors and by the Secretary.

On appeal from this decision this Court stated the problem:

"The Secretary had a right to examine the evidence which was said to show he was in error. Seagram had a right to present somewhere sometime the evidence which it said established that its label should be approved. Neither the statute nor the regulations expressly provide for a hearing before the Secretary." (p. 4 Slip Opinion)

This Court then affirmed the District Court's granting of summary judgment but held that Seagram was entitled to:

"resubmit its label to the Secretary with a proffer of the evidence which it deems sufficient to establish the facts requiring or justifying approval of the label. The present judgment shall not be deemed to be a bar to a civil action brought under the statute to enjoin, annul or suspend any action of the Secretary taken thereafter upon the label as resubmitted." (p. 6 Slip Opinion)

The present petition by the competitors of Seagram who have intervened, challenges the obvious good sense and fairness of the procedure adopted by this Court. They

proceed on the theory that the instant proceeding does not involve the issue of whether the particular statement proposed by Seagram as to its product "Calvert Extra" is true and not misleading, but rather whether such statements as to all neutral spirits in all whiskeys are true and not misleading. Thus they contend that the instant proceeding does not involve review of administrative action in this particular case but rather an attempt to revise a whole set of administrative regulations.

Intervenors raised this very same issue not only in their briefs on the appeal, but in their oral arguments. No new cases are cited; no new arguments are made. This Court considered these arguments specifically in its opinion. It held:

"Considerable confusion has crept into this controversy by way of discussion of the rule-making by which the Regulation was promulgated, the power of rule-making, the scope of the rule promulgated, and such matters. * * * But we do not have such a case. The target of Seagram's complaint is the Secretary's refusal to approve a specific label. This is the core of the controversy. Seagram does not attack the Regulation *in vacuo* or *pro bono publico*. It says its label should be approved. It proffers facts and then a series of legal contentions, in the course of which it reaches the argument that if the Regulation means its label may be rejected, the Regulation is invalid. This is the normal course of such disputes. The point upon which the proceeding devolves in the approval *vel non* of this label." (p. 6 Slip Opinion)

This Court correctly held that Seagram is entitled "to present somewhere sometime the evidence which it said established that its label should be approved" and that "the Secretary had a right to examine the evidence which was said to show he was in error" before Court review (p. 4 Slip Opinion). This Court's decision accomplished this end. There is no conceivable way these competitors of

Seagram can be prejudiced by permitting Seagram to present, and the Secretary to review, the evidence which will establish that the statement Seagram proposed to make on its label for Calvert Extra was true, not misleading and informative.

Intervenor's Petition for Rehearing *en banc* does not present any new authorities and merely repeats the very same arguments which this Court unanimously rejected. No question of public significance is presented.

Intervenor's Petition should be denied.

Dated: February 15, 1965

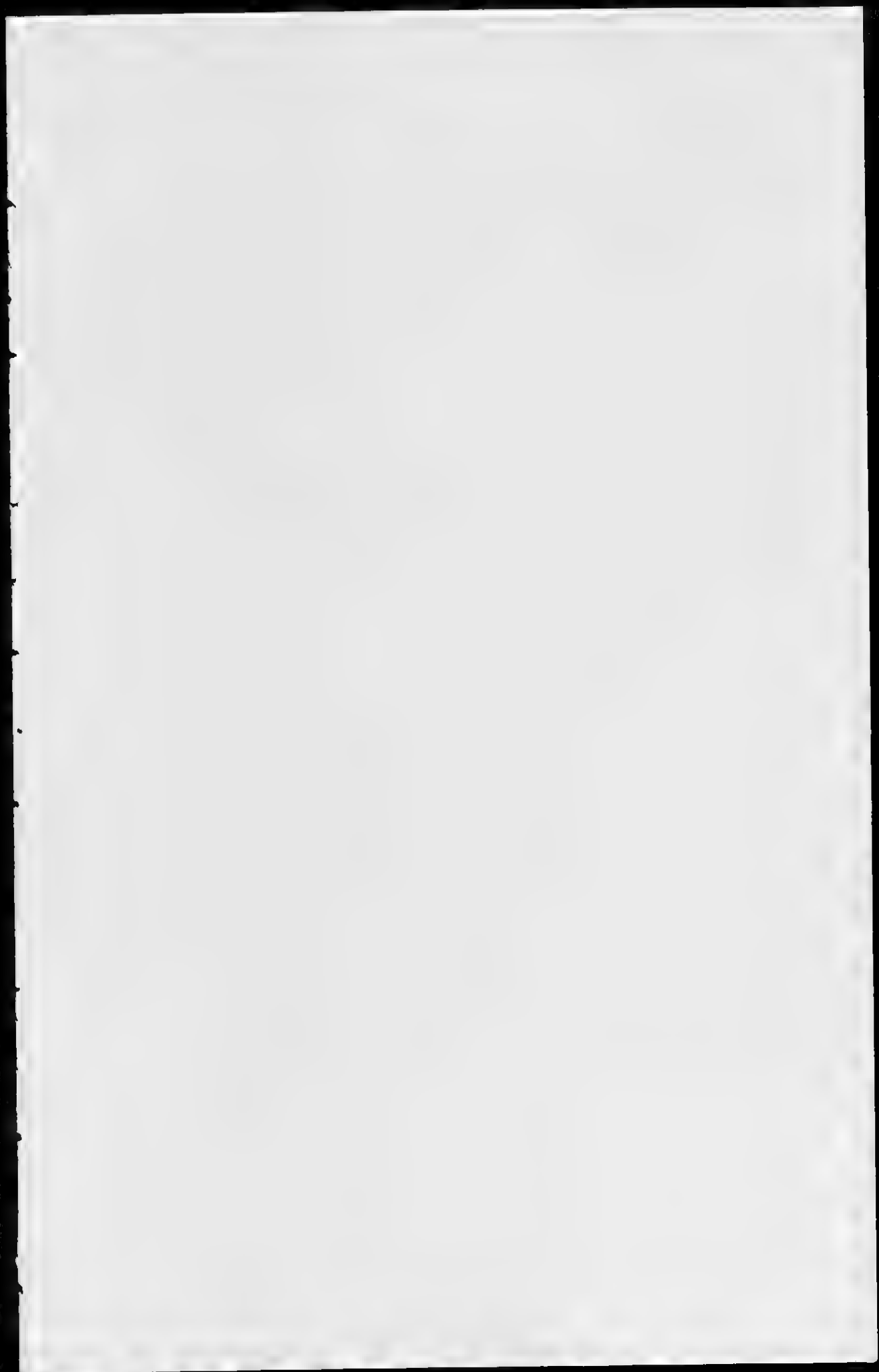
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BRIEF FOR INTERVENOR APPELLEES

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,465

JOSEPH E. SEAGRAM & SONS, INC., *Appellant,*

v.

HONORABLE DOUGLAS DILLON, ET AL., *Appellees.*

Appeal From the United States District Court for the
District of Columbia

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United States Court of Appeals
for the District of Columbia Circuit

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CLERK

STATEMENT OF QUESTIONS PRESENTED

In the opinion of the intervenors the questions are:

1. Whether a regulation issued pursuant to the Federal Alcohol Administration Act, prohibiting age, maturity or similar representations as to neutral spirits is within the scope of the Act and, if so, whether there is substantial evidence to support the finding of the Secretary of the Treasury that such a regulation is likely to prevent consumer deception?

2. Whether there is any merit to appellant's allegation that the regulation was arbitrarily, erroneously, and capriciously applied to its neutral spirits:

(a) Where appellant never presented its contentions to the administrative agency for consideration although it had ample opportunity to do so either in its application for certificate of label approval, or on reconsideration after denial thereof, or by virtue of Sections 1003(d) or 1004(d) of the Administrative Procedure Act, or by way of petition pursuant to 26 C.F.R. § 601.601(c);

(b) Where there is substantial evidence showing that the regulation is necessary to prevent consumer deception; and

(c) Where the administrative records show that the regulation was intended to include neutral spirits stored in the same manner as appellant's neutral spirits?

3. Whether the pleadings posed factual issues requiring a trial on the merits where the entire administrative record, which was before the Court, contains substantial evidence supporting the validity of the regulation?

4. Whether the appellant exhausted its administrative remedies and/or whether the doctrine of exclusive primary jurisdiction is applicable?

INDEX AND TABLE OF AUTHORITIES

	Page
Counterstatement of the Case	1
Statutes and Regulations Involved	7
Summary of Argument	7
Argument:	
I. The Regulation is Valid	9
A. The Regulation is Within the Scope of the Act	9
B. The Regulation Was Properly Issued After Notice and Hearing and There is Substantial Evidence to Support the Secretary's Finding That Age or Similar Representations as to Neutral Spirits Are Misleading	10
II. The Avis Ruling Was a Proper Application of the Regulation	18
A. The Regulation Includes Appellant's Neutral Spirits	18
B. The Application of the Regulation Was Nei- ther Erroneous, Arbitrary, Nor Capricious..	21
III. Appellant Is Not Entitled To a De Novo Trial ..	23
A. Appellant Has Not Exhausted Its Adminis- trative Remedies	24
B. The Doctrine of Primary Jurisdiction Is Applicable	25
C. The Cases Cited By Appellant Do Not Require a De Novo Trial or Reversal of the Lower Court's Decision	28
Conclusion	30
Appendix	1

TABLE OF CASES

CASES:	Page
<i>American Trucking Associations v. United States</i> , 344 U.S. 298 (1953)	17
<i>American Power Co. v. S.E.C.</i> , 329 U.S. 90 (1946) ...	18
<i>Armour and Co. v. Freeman</i> , 113 U.S. App. D.C. 37, 304 F. 2d 404, cert. denied, 370 U.S. 920 (1962) ..	28, 30
<i>Bowles v. Seminole Rock and Sand Co.</i> , 325 U.S. 410 (1945)	18
* <i>Brougham v. Blanton Manufacturing Co.</i> , 249 U.S. 495 (1919)	17
<i>California v. Federal Power Commission</i> , 369 U.S. 482 (1962)	26
<i>Continental Distilling Corp. v. Humphrey</i> , 95 U.S. App. D.C. 104, 220 F. 2d 367 (1954)	8, 28
<i>Continental Distilling Corp. v. Humphrey</i> , 101 U.S. App. D.C. 210, 247 F. 2d 796 (1957) ...	3, 8, 21, 27, 28, 29
<i>Far East Conference v. United States</i> , 342 U.S. 570 (1952)	26
* <i>Federal Power Commission v. Texaco Inc.</i> , ... U.S., 12 L. ed 2nd 112 (32 L.W. 4370 (1964))	22, 23
* <i>Federal Security Administration v. Quaker Oats Co.</i> , 318 U.S. 218 (1943)	15, 17
<i>Friend v. Lee</i> , 95 U.S. App. 224, 221 F. 2d 96 (1955) ..	28, 29
<i>Hamilton v. Kentucky Distilleries Co.</i> , 251 U.S. 146 (1917)	9
<i>International Shoe Co. v. Federal Trade Commission</i> , 280 U.S. 291 (1930)	16
<i>Mitchell v. Budd</i> , 350 U.S. 473 (1956), reh. denied, 351 U.S. 834 (1956)	17
<i>Myers v. Bethlehem Ship Building Co.</i> , 303 U.S. 41 (1938)	24
<i>Opp Cotton Mills v. Administrator</i> , 312 U.S. 126 (1941)	17
* <i>Pacific States Box and Basket Co. v. White</i> , 296 U.S. 176 (1935)	9, 18, 28
<i>Pan American World Airways, Inc. v. United States</i> , 371 U.S. 296 (1963)	26
<i>Phelps Dodge Corp. v. N.L.R.B.</i> , 313 U.S. 177 (1941) ..	10, 18
<i>R. C. A. v. United States</i> , 341 U.S. 412 (1951)	18
<i>Schechter Poultry Corp. v. United States</i> , 295 U.S. 495 (1935)	12

* Cases chiefly relied on are marked with an asterisk.

Index and Table of Authorities Continued iii

	Page
* <i>Unemployment Compensation Commission v. Aragon</i> , 329 U.S. 143 (1946)	24
<i>United States v. Antikamnia Chemical Co.</i> , 231 U.S. 654 (1913)	9
<i>United States v. L. A. Tucker Truck Lines</i> , 334 U.S. 33 (1952)	24
<i>United States v. 95 Barrels of Vinegar</i> , 265 U.S. 438 (1924)	18
* <i>United States v. Storer Broadcasting Co.</i> , 351 U.S. 192 (1955)	22, 23
* <i>United States v. Western Pacific Railroad Co.</i> , 352 U.S. 59 (1956)	25
<i>Willapoint Oysters v. Ewing</i> , 174 F. 2d 676 (9th Cir. 1949), cert. denied, 338 U.S. 860 (1949)	18

STATUTES:

United States Code:

Title 5, section 1003(d)	6, 7, 21, App. 2
Title 5, section 1004(d)	6, 7, App. 2
Title 27, section 205(e)	2, 3, 4, 7, 9, 18, 19, App. 1

REGULATIONS:

Code of Federal Regulations, 1961 Ed., Title 26:

Section 601.307	6, 7, App. 2
Section 601.601(c)	6, 7, 21, App. 3

Code of Federal Regulations, 1961 Ed., Title 27:

Section 5.10(j)	5, 20, App. 3
Section 5.21(a)	8, 19, App. 3
Section 5.21(b)	App. 4
Section 5.21(b)(7)	2, App. 4
Section 5.39(d)	2, 3, 4, 6, 9, 12, 13, 15, 18, 19, 27, 29, App. 4
Section 5.39(e)(5)	9, 12, 15, App. 4

FEDERAL REGISTER:

1 F.R. 113	4
13 F.R. 4927	13
21 F.R. 8321	16
23 F.R. 2180	2

* Cases chiefly relied on are marked with an asterisk.

iv Index and Table of Authorities Continued

MISCELLANEOUS:	Page
House Reports:	
H. Rep. 1542, 74th Cong., 1st Sess., 1935	10, 12
Senate Reports:	
S. Rep. 1215, 74th Cong., 1st Sess., 1935	12
Executive Orders:	
Ex. Order No. 6474, December 4, 1933	11
Print of Regulations No. 5, as amended to June 5, 1948	13
Federal Alcohol Control Administration Rulings:	
Misbranding Ruling No. 4	11
Misbranding Ruling No. 57	11
Federal Alcohol Administration Regulations:	
Section 39(b)	11
Federal Alcohol Administration Circular:	
Circular dated February 28, 1936	12
Federal Alcohol Administration Digests:	
Digest of Interpretations, F.A. 91, Jan. 21, 1937 ..	13

IN THE
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Appeal From the United States District Court for the
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BRIEF FOR INTERVENOR APPELLEES

COUNTERSTATEMENT OF THE CASE

On January 28, 1963, appellee Avis denied an application for a certificate of label approval which had been filed by Joseph E. Seagram and Sons (appellant). On January 29, 1963, appellant filed a complaint against the Secretary of the Treasury and several of his subordinate officials (appellees) in which it sought a judgment declaring that a label it wished to affix to Calvert Extra, a blended

whiskey,¹ was lawful under the Federal Alcohol Administration Act, 27 U.S.C. 205(e) and the implementing regulations, 27 C.F.R. 5.39(c),² and that the contrary decision of the appellee Avis was erroneous arbitrary, and capricious. The complaint also alleged that if the label violated the regulation, then the regulation is null and void in that it exceeds the powers granted to the Secretary of the Treasury by the Federal Alcohol Administration Act (J.A., Vol. I, pp. 6A-15A).

National Distillers and Chemical Corporation, Schenley Industries, Inc. and Stitzel-Weller Distillery, Inc. were granted leave to intervene under Rules 24(a)⁽²⁾ and 24(b) of the Federal Rules of Civil Procedure (J.A., Vol. I, p. 59A). These appellees will hereafter be referred to as "intervenors".

The substance of appellant's complaint is that the neutral spirits it is using in Calvert Extra have been improved by storage in used whiskey barrels and, for this reason, Section 5.39(d) of the Distilled Spirits Labeling Regulations, 27 C.F.R. § 5.39(d), which applies, *inter alia*, to all neutral spirits is not applicable to appellant's neutral spirits. This is a direct attack on the validity of the regulation.

Appellant is actually seeking an amendment of the regulation by way of a judicial decree declaring that the following italicized statements on its proposed label do

¹ "Blended Whiskey" is a mixture which contains at least 20 percent by volume of 100° proof straight whiskey and, separately or in combination, whiskey or neutral spirits, if such mixture at the time of bottling is not less than 80° proof (27 C.F.R. § 5.21(b)(7)).

² This citation of the regulation is correct. Paragraph 2 of Treasury Decision 6288 published in the Federal Register for April 3, 1958, 23 F.R. 2180, provided for the deletion of subparagraph (c) of section 5.39, effective April 3, 1961, and the relettering of subparagraph (d) as (c). Apparently through oversight, this change was not made in the Code of Federal Regulations. For this reason, the challenged regulation will be referred to as Section 5.39(d).

not violate Section 5.39(d), as appellee Avis ruled, or, if they do, that the regulation itself is invalid:

*"Calvert Extra was begun years ago when these spirits and whiskies were put aside. The grain neutral spirits in this product contribute a unique, delightful taste of their own, the result of a special distillation process and of storage for at least four years in specially selected used cooperage—barrels which were previously used for aging our fine whiskies. Today only Calvert has the combination of spirits and choice straight whiskies to create this superb blend of unique character and unsurpassed smoothness — CALVERT EXTRA."*³

This Court has held that the italicized storage statements are age statements. *Continental Distilling Corporation v. Humphrey*, 101 U.S. App. D.C. 210, 212, 247 F. 2d 796 (1957).⁴

The regulation upon which the Avis ruling was based, provides:

*"Age, maturity or similar statements or representations as to neutral spirits * * * are misleading and are prohibited from being stated on any label."* (27 C.F.R. § 5.39(d))

This regulation was promulgated by the Secretary of the Treasury under authority of the Federal Alcohol Administration Act, 49 Stat. 977, 27 U.S.C. 201, *et seq.* (hereinafter referred to as the Act). Section 205(e) of the Act empowers the Secretary of the Treasury to prescribe such labeling regulations as would, among other things, prohibit deception of the consumer and prohibit,

³ Unless otherwise noted, all emphasis in the quotations in this brief will be added.

⁴ This decision points up the basic inaccuracy of appellant's contentions as set forth in footnote 5 on page 12 of its brief. It may also be observed that the holding attributed to the "District Judge" in that footnote does not appear in the record.

irrespective of falsity, such statements relating to age, manufacturing processes, analysis, guarantees, and scientific or irrelevant matters as the Secretary of the Treasury finds to be likely to mislead the consumer.

Pursuant to this authority, regulations were promulgated establishing a detailed and comprehensive system for the control of labeling practices including the submission to, and approval by, the government of all labels prior to their use. As part of this system, Regulations No. 5 (27 C.F.R. Part 5) relating to the labeling and advertising of distilled spirits were issued on January 18, 1936 (1 F.R. 113). Section 5.39(d) was adopted at that time following the prescribed notice and hearing.⁵

On two occasions since the promulgation of Section 5.39(d), the administrative officials held full public hearings, each of which was preceded by notice advising all interested parties that the hearings would be concerned with proposals to amend Section 5.39(d) so as to permit general and inconspicuous statements and representations relating to age in the case of neutral spirits which had been stored in wood. The record of the first hearing, which was held in 1948, shows that the proposal was opposed by all of the parties including appellant and that the uncontradicted evidence was that references to age of neutral spirits would result in consumer deception (J.A., Vol. II, pp. 125A-137A).

The record of the second hearing, which was held in November and December, 1956, contains the same overwhelming evidence of consumer deception (J.A., Vol. II, pp. 138A-173A). At this hearing all parties except appellant and Continental Distilling Corporation opposed the proposed amendments. Appellant did not offer any

⁵ Section 205 of the Act provides:

"The Administrator shall give reasonable public notice, and afford to interested parties opportunity for hearing, prior to prescribing regulations to carry out the provisions of this section."

expert testimony to support its contention that neutral spirits "age" when stored in wood (*Id.*, pp. 154A-156A).⁶ Continental Distilling Corporation favored the amendments only if they were "made prospective in their application" (*Id.*, p. 156A).

The evidence and testimony at these hearings was specifically concerned with neutral spirits stored like appellants, in reused cooperage. One witness, an expert chemist, fully explained the result of storing neutral spirits in reused cooperage and concluded that such neutral spirits "extract whiskey from the staves of the barrels and as a result take on a slight whiskey character without noticeably softening the spirits themselves (J.A., Vol. II, p. 136A). The administrative record is completely devoid of any offsetting expert testimony.

In order to bring the issues of this case into final focus, a return to the complaint is necessary. The complaint does not allege that the facts set forth therein were made known to the appellees either prior to or after the ruling denying appellant's application for a certificate of label approval. The Avis ruling was made solely on the basis of the appellant's barebones application (J.A., Vol. II, pp. 113-115A) and the regulation. Even assuming the truth of the allegations in the complaint—which are flatly contradicted by the evidence in the hearing records—appellee Avis was never requested to rule on the issues which appellant presented to the Court below and he was never informed of the information appellant is now relying on to characterize his ruling as erroneous, arbitrary and capricious. Appellant's failure in this regard is an

⁶ Indeed, a thorough search of all documents filed in this case by appellant, does not reveal a claim that neutral spirits "age" when stored in wood. For example, see paragraphs 7 and 8 of the complaint (J.A., Vol. I, p. 8A), where appellant carefully draws a distinction between its neutral spirits storage program and its program of aging fine whiskies. This is a distinction without a difference since both claims are age representations (27 C.F.R. § 5.10(j)).

absolute defense to the charges of arbitrary, capricious and erroneous action by appellee Avis.

The facts now being relied on by appellant show that appellant, in 1949, undertook a study to determine the effect of storing neutral spirits in wood barrels which had been previously used for the storage of whiskey. After alleged extensive testing, the appellant, in 1958, began storing neutral spirits in used whiskey barrels with the intent of using such spirits in Calvert Extra, a new brand name for appellant's blended whiskey.

At any time during this period the appellant could have effectively pursued any one or more of several available administrative remedies. First, it could have made a full presentation of the merits of its case at the 1956 hearing. Instead, it merely presented conclusory statements by Mr. Lind, who is not a chemist, to the effect that neutral spirits *age* in wood, that the regulations stifled technological improvement; and that *aging* neutral spirits in wood improved their taste (J.A., Vol. II, pp. 154A-156A).⁷ Appellant made no effort to submit briefs to support its position even though opportunity to do so was given (J.A., Vol. II, p. 145A), and it made no effort to justify a change in the regulation based on the facts it acquired during the period after 1949. Second, the appellant could have, but never did avail itself of the remedies provided by the Administrative Procedure Act by which it could have sought a declaratory order to "remove uncertainty" (5 U.S.C. 1004(d)) or by which it could have petitioned "for the issuance, amendment, or repeal" of Section 5.39(d) as provided in 5 U.S.C. 1003(d) and 26 C.F.R. § 601.601(c). See: J.A., Vol. II, p. 109A. Third, the appellant, either before or after the Avis ruling, could have fully documented its contentions and sought a ruling under 26 C.F.R. 601.307.

⁷ Stripped of hyperbole and embellishments, these are the identical claims upon which the appellant is now trying to fashion "factual issues".

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Section 5 of the Federal Alcohol Administration Act of August 29, 1935, 49 Stat. 981 (1935), as amended, 27 U.S.C. § 205 (1959); Sections 4(d) and 5(d) of the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. §§ 1003(d) and 1004(d); and the relevant administrative regulations 26 C.F.R. §§ 601.307 and 601.601(c), and 27 C.F.R. Part 5 (1961); are set forth in the appendix to this brief.

SUMMARY OF ARGUMENT

Pursuant to an Act of Congress, the Secretary of the Treasury promulgated regulations concerning the labeling of distilled spirits. The Act required such regulations to prohibit, *irrespective of falsity*, statements relating to age, or manufacturing processes that the Secretary of the Treasury finds likely to mislead the consumer.

In 1936, following notice to all interested parties and a hearing, the Secretary found that the appearance on labels and in advertising of age, maturity, or similar statements or representations as to neutral spirits are misleading. This finding was embodied in the regulation in question, which has remained unchanged in this regard since that date.⁸

On two occasions since 1936 this regulation has been the subject of further hearings at which consideration was given to proposals to amend the regulations so as to permit the type of labeling statements which appellant now desires to make. The overwhelming evidence at these hearings, which were held in 1948 and 1956, showed that such statements would be misleading.

⁸ Even prior to 1936, the Federal Alcohol Control Administration had ruled that such labeling statements were prohibited because they would be misleading to the consuming public (J.A., Vol. I, pp. 32A, 50A, 53A).

The records of these hearings show that they were concerned with the identical issues now being raised by appellant, i.e., the effect on neutral spirits by storage in used whiskey barrels and whether storage statements as to neutral spirits would be likely to mislead the consumer. Thus, the factual issues raised by appellant are not new and novel, they have been considered and rejected in the rule making hearings.

These records were before the court below and it was fully advised "of the considerations which caused the administrative agency" to issue the regulation in 1936, and to reject the amendments proposed in 1948 and 1956. This factor alone, distinguishes the instant case from *Continental Distilling Corporation v. Humphrey*, where the administrative record was not before this Court on the appeal from a order granting a motion to dismiss.⁹

Under the labeling regulations, which define innumerable classes of distilled spirits, neutral spirits, or alcohol, comprise one class, 27 C.F.R. § 5.21(a). The challenged regulation applies with equal force to all neutral spirits in that class, including appellant's. Thus, the regulation was not arbitrarily, capriciously and erroneously applied to appellant and there is no discrimination of any sort.

In addition to the foregoing, which shows the regulation was validly adopted and applied, the two cardinal principles of exhaustion of administrative remedies and exclusive primary jurisdiction are applicable in the event this Court finds that the factual issues appellant is raising are new and novel and that they were not determined during the administrative hearings. In this circumstance, the exhaustion doctrine would be applicable because the appellant did not raise the issues and facts it is now relying on at the administrative level even though it

⁹ 95 U.S. App. D.C. 104, 220 F. 2d 367 (1954). See the same case at 101 U.S. App. D.C. 210, fn. 2 on p. 212.

had ample opportunity to do so. The primary jurisdiction doctrine would be applicable for the same reason and because the court is being asked to resolve issues which, under the regulatory scheme, have been entrusted to the special competence of an administrative body.

ARGUMENT

I

THE REGULATION IS VALID

Appellant challenges only Section 5.39(d) of the regulations. It is to be noted, however, that Section 5.39(e)(5) repeats the prohibition against age or similar representations as to neutral spirits and other distilled spirit products. It is the intervenors' position that the regulation is valid if it is within the scope of the Act; if it was properly issued; and if the Secretary's discretion was reasonably exercised. The Court's inquiry is ended if these questions are answered in the affirmative. *Pacific States Box and Basket Co. v. White*, 296 U.S. 176 (1935); *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146, 156-157 (1917); *United States v. Antikamnia Chemical Co.*, 231 U.S. 654 (1913). A trial is not necessary for the determination of these issues and could only involve the Court in questions which have, by the Congress, been delegated to the administrative agency.

A. The Regulation Is Within the Scope of the Act

Congress, in substance, directed the Secretary of the Treasury to promulgate labeling regulations prohibiting, amongst other things, and *irrespective of falsity*, such statements relating to age, identity, and manufacturing processes, *as he finds to be likely to mislead the consumer* (Section 205(e)(1)). The Secretary was also directed to promulgate regulations prohibiting statements on the label that are disparaging of a competitor's product or are false, *misleading*, obscene, or indecent (Section 205(e)(4)).

An expression of the Congressional intent underlying these provisions is found in the report of the Ways and Means Committee on H. R. 8870, 74th Cong., 1st Sess., 1935, House Report No. 1542, Federal Alcohol Control Bill, p. 12, where it is stated:

"The labeling and advertising provisions (sec. 5(e) and (f)) prohibit the use of interstate channels when labeling or advertising of distilled spirits, wine, or malt beverages does not conform to regulations, with the force and effect of law, prescribed by the Administrator. *Definite standards are laid down for these regulations.* The regulations are not only required to prohibit labeling and advertising that is false, misleading, obscene, or indecent, or that disparages competitor's products, but must also provide for the prevention of deception of the consumer with respect to the product or its quality. *They must also prohibit, regardless of their truth, statements relating to age, manufacturing process, analyses, guarantees, and scientific or irrelevant matters that the administrator finds likely to mislead the consumer * * *.*"

It is elementary that where Congress broadly defines the policies entrusted to an agency, "the relation of remedy to policy is peculiarly a matter for administrative competence." *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941). Since the challenged regulation deals with specific areas of Congressional concern—age, manufacturing processes, and consumer deception—it is well within the scope of the Act.

B. The Regulation Was Properly Issued After Notice and Hearing and There Is Substantial Evidence to Support the Secretary's Finding That Age or Similar Representations as to Neutral Spirits Are Misleading

When prohibition was abolished on December 5, 1933 by ratification of the Twenty-First Amendment, the distilling industry became subject to regulation under the National Industrial Recovery Act's Codes of Fair Competition, administered by the Federal Alcohol Control

Administration (FACA).¹⁰ The regulation now being attacked by the plaintiff traces its origin to rulings of the FACA in 1934. Thus, Misbranding Ruling No. 4, issued September 21, 1934, in discussing age statements on labels, stated:

"Age, maturity or similar statements or representations as to neutral spirits * * * are misleading and are prohibited." (J.A., Vol. I, p. 32A)

Except for the addition of "specialties", the present regulation is identical with the 1934 FACA ruling.

FACA Misbranding Ruling No. 57, issued November 20, 1934, included the following statement:

"In the opinion of the administration, the distilled spirits specifically named in this ruling [Misbranding Ruling No. 4] including vodka, are types of distilled spirits whose quality does not improve with aging; and the ruling in question was predicated upon the ground that, being meaningless, representations of age for these distilled spirits would be misleading to the consuming public." (J.A., Vol. I, p. 50A)

On May 13, 1935, the FACA published revised regulations relating to false advertising and misbranding of distilled spirits, in which it was stated:

"* * * age, maturity or similar representations as to neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs and bitters, are misleading, and shall not appear upon any label, except that the use of the word 'old' or other words denoting age, appearing as part of the brand name, shall not be deemed to be an age representation in the case of such distilled spirits, or in the case of distilled spirits bottled in bond under the Bottling in Bond Act of the United States, as to all other distilled spirits, the word 'old' or other word denoting age, appearing as part of the brand name, shall be deemed to be an age

¹⁰ Executive Order No. 6474, dated December 4, 1933.

representation unless the word 'brand' appears in direct conjunction with such brand name in letters of equally conspicuous color and at least one-half the size of the type in which such brand name is printed." (J.A., Vol. I, pp. 53A-54A)¹¹

These actions show the consistent view of the FACA on the very question at issue here. The code system of regulation was terminated by the Supreme Court's decision in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

Soon thereafter, Congress, recognizing the need to protect the consumer from misleading information,¹² enacted the Federal Alcohol Administration Act, Title 27 U.S.C. §§ 201, *et seq.* This Act provides for notice and public hearing prior to adoption of labeling regulations (§ 205). Pursuant to this requirement, notice of public hearing was issued on October 14, 1935, and a draft of proposed regulations to be considered at the public hearing was attached to the notice (J.A., Vol. I, p. 33A-47A). Section 39(d) of the draft was identical with Section 5.39(d) which is now being challenged (*Id.*, p. 43A).

Therefore, it was clear at the time that the proposed regulations would prohibit age representations for neutral spirits. Even so, there was no evidence directed to this proposal at the October 30, 1935 hearing and the regulation was adopted in the form proposed.

Following adoption of Section 5.39(d), the Federal Alcohol Administration, on February 28, 1936, in a circular addressed to all bottlers of distilled spirits, advised the industry that age statements on neutral spirits were pro-

¹¹ This ruling is now Section 5.39(e)(5). It was included in the October 14, 1935 notice of hearing issued by the Federal Alcohol Administration and was adopted, there being no opposition at the hearing.

¹² House Report No. 1542, p. 12, 74th Cong., 1st Sess., 1935; Senate Report No. 1215, 74th Cong., 1st Sess., 1935.

hibited.¹³ The following year, the Federal Alcohol Administration circulated a digest of its interpretations in which the following comment concerning Section 5.39(d) appeared:

"Bottling dates, distilling dates, and words such as 'Old' and 'Matured', etc. are representations, denoting age or maturity and are, therefore, prohibited from appearing upon labels for neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs and specialties due to the fact that they are considered misleading." (FA-91, January 21, 1937, at p. 23)

The second public hearing on this subject was held on October 25, 1948. Notice of this hearing, together with a draft of the proposals to be considered, was issued on August 25, 1948. Proposal No. 10 stated:

"10. To amend Sections 39(d) and (e) (27 CFR 5.39(d) and (e)), 64(c) (27 CFR 64(c)) and other pertinent sections of the regulations so as to except from the prohibition against statements and representations relating to age in the case of neutral spirits, general and inconspicuous references of an informative nature, on back labels or in advertisements to production methods involving 'mellowing', 'softening', 'velveting', or 'smoothing' neutral spirits through storage in oak cooperage for a period of not less than 6 months." (13 F.R. 4927)

This proposal, which would have permitted "general and inconspicuous statements and representations relating to the age of neutral spirits" was opposed by every party at the hearing, *including the two representatives of Joseph E. Seagram & Sons, Inc., the appellant herein.*

Appellant's spokesmen adopted the testimony of Mr. Jones, who represented the Distilled Spirits Institute (J. A., Vol. II, pp. 136A-137A). Mr. Jones opposed Proposal No. 10 on the grounds that it would result in no useful

¹³ Print of Regulations No. 5 as amended to June 5, 1948, Appendix C, p. 49.

knowledge being communicated to the consumer and that it would give rise to competitive claims that would exaggerate the importance of a manufacturing process and confuse the purchasing public (Id., pp. 132A-133A).

Mr. Joseph C. Haefelin, a chemist in charge of production for the American Distilling Company, stated:

"It is the position of our company that the adoption of this proposal would constitute a considerable departure from the long established concept that spirits do not improve with age.

• • •

"I would like to emphasize that the aging of neutral spirits does not constitute aging in the same sense as the aging of whiskey. In the aging of whiskey, esterification proceeds through the action of the organic acids present on the higher alcohol. This develops aroma. There is a selective penetration of the various congeners of the whiskey. This reduces the concentration after aging of some of the original congeners and increases others. The charred surface of the barrel also absorbs some of the fusel oil.

"The composition of neutral spirits is such that the whiskey aging process described above cannot function in the same manner since neutral spirits contain an infinitesimal quantity of congeners.

"We have stored substantial quantities of neutral spirits in oak barrels and in ventilated metal tanks, and our experience has demonstrated that the latter is the better method of softening freshly distilled neutral spirits.

"During storage in ventilated metal tanks, alcoholic vapors accumulate above the surface of the liquid and these vapors contain most of the infinitesimal quantities of congeners, particularly aldehydes which are responsible for the slight sharpness which is usually associated with freshly distilled neutral spirits.

"Due to temperature changes during storage, the vapors dissipate themselves into the outside atmosphere through these ventilated tops of the tanks, thus re-

moving practically all of the sharpness. The resulting neutral spirits after six months of storage in this type of tank and under properly controlled temperatures, is a softer spirit than the same spirit stored six months in an oak barrel.

"Moreover, we have observed that when neutral spirits are stored in reused whiskey barrels, which is the only type of cooperage used in the industry for this purpose, the spirits extract whiskey from the staves of the barrels and as a result take on a slight whiskey character without noticeably softening the spirits themselves, whereas, spirits stored in ventilated metal tanks in the manner outlined is truly a neutral spirit, has a higher degree of purity after storage, and is softer and smoother as a result of such storage." (Id., pp. 134A-136A)

Since there was no evidence to support Proposal No. 10 and it was clear that the industry was of opinion that consumer deception would result if the proposal was adopted, the regulations (Section 5.39(d) and 5.39(e)(5)) were not amended.¹⁴

The third public hearing was held on November 28 and December 5, 1956. The notice of this hearing, dated October 31, 1956, stated that the following proposals, among others, would be considered:

"24. To amend Section 39(e)(5) (27 CFR 5.39 (e)(5)) to permit truthful references of a general and informative nature relating to methods of production involving storage as to certain products, such as neutral spirits and gin, which are not entitled to bear age statements, provided they have been stored in oak containers for some specified minimum period, e.g. three months."

* * *

¹⁴ In *Federal Security Administration v. Quaker Oats Co.*, 318 U.S. 218 (1943), the administrator's standards of identity for "Farina" were under attack. The Supreme Court held that the testimony of industry and consumer representatives as to consumer confusion was sufficient to support a finding of consumer confusion. Accordingly, it specifically reversed the lower court's findings that such testimony was too "speculative and conjectural" to support the administrator's finding (318 U.S. at pp. 226-228).

"30. To amend Section 64(c) (27 CFR 5.64(c)) to permit truthful references of a general and informative nature relating to methods of production involving storage in advertisements for certain products, such as neutral spirits and gin, which are not entitled to bear age statements, provided they have been stored in oak containers for some specified minimum period, e.g., three months." (J.A., Vol. II, pp. 145A-146A; 21 F.R. 8321)

This hearing developed a wealth of comment concerning proposals 24 and 30. The overwhelming majority of the participants at the hearing continued to be of the opinion that age representations as to neutral spirits would be likely to deceive the consumer (Id., pp. 147A-148A, 154A, 157A-165A, 185A-187A).¹⁵

Only two companies favored adoption of the proposals—Joseph E. Seagram & Sons, Inc. and Continental Distilling Corporation.¹⁶ Continental conditioned its approval of the proposals on their adoption being "made *prospective* in their application" (Id., p. 156A). This would, of course, eliminate the chance of one distiller getting a jump on the remainder.

Appellant changed its position 180 degrees and, whereas it opposed the amendments at the 1948 hearing, it now spoke in favor of the proposed amendments. Mr. Lind, appellant's spokesman, offered the following comment in favor of the proposals:

" * * * We know, and most distillers know, that aging in wood improves neutral spirits and gin. I am not a chemist and in fact, I am not interested in the chemistry of whiskey. There is only one test in which

¹⁵ The testimony as to consumer deception of persons skilled in the business is conclusive unless there is substantial testimony to the contrary. See: *International Shoe Company v. Federal Trade Commission*, 280 U.S. 291, 299 (1930).

¹⁶ The list of parties to this hearing and the 1948 hearing are set forth in J.A., Vol. II at pp. 141A-144A and 128A-131A respectively.

I am interested, and that is the test of taste. I defy anyone to prove to me that aging neutral spirits or gin in wood does not improve it. * * *” (Id., pp. 154A-155A)

Mr. Lind, who is not a chemist, neither supported his opinion with expert testimony nor did he explain the factors which led appellant to a position wholly inconsistent with its position at the 1948 hearing.¹⁷

The proposals considered at the third public hearing were not adopted and the regulation, which first became effective in 1934 under the FACA, remain unchanged to this time.

In these circumstances, the regulation, which has the force and effect of a statute, is conclusive and plaintiff's challenge to its validity must fail. In *Brougham v. Blanton Manufacturing Co.*, 249 U.S. 495 (1919), the Court held:

“In other words, the power of determining whether a trade name is ‘false or deceptive’ given by the law to the Secretary of Agriculture, is, when exercised, conclusive of the falsity or deception of the name.” (249 U.S. at 499)

Therefore, the Secretary's finding that the statement of an age claim for neutral spirits is misleading is based on sound evidence, it is reasonable, it is adapted to the statutory ends, and, in the circumstances of this case, it is controlling. In *Federal Security Administration v. Quaker Oats Company*, 318 U.S. 218 (1943), which involved a similar statute which also called for the exercise of judgment by the administrator, the Court said:

“That judgment, if based on substantial evidence of record, and if within statutory and constitutional limi-

¹⁷ Even where there is conflicting testimony the courts will not pick and choose in order to substitute its judgment for that of the administrative body. *Opp Cotton Mills v. Administrator*, 312 U.S. 126, at 156 (1941), and *Mitchell v. Budd*, 350 U.S. 473, at 480 (1956), reh. denied 351 U.S. 834 (1956); and *American Trucking Associations v. United States*, 344 U.S. 298, at 314 (1953).

tations, is controlling even though the reviewing court might, on the same record, have arrived at a different conclusion." (318 U.S. at p. 228)¹⁸

Even if the truth of appellant's proposed labeling statements is assumed, this would not limit the Secretary's authority for he is empowered to prohibit even true statements if he finds they are likely to mislead (Section 205(e)(1) and (e)(4)). The Supreme Court gave recognition to this in *United States v. 95 Barrels of Vinegar*, 265 U.S. 438 (1924), when it said:

"The statute is plain and direct. Its comprehensive terms condemn every statement, design and device which may mislead or deceive. Deception may result from the use of statements not technically false or which may be liberally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false." (265 U.S. at 442)

On the basis of the foregoing, it is respectfully submitted that Section 5.39(d) is valid.

II.

THE AVIS RULING WAS A PROPER APPLICATION OF THE REGULATION

A. The Regulation Includes Appellant's Neutral Spirits

Since 1934, when the FACA originally promulgated the challenged regulation, the administrative officials charged with its enforcement have consistently interpreted it to be applicable to neutral spirits stored in reused whiskey barrels. This long-standing application is of controlling weight here. This is the teaching of *Bowles v. Seminole Rock &*

¹⁸ See also: *Phelps Dodge Corp. v. NLEB*, 313 U.S. 177 (1946); *American Power Co. v. S. E. C.*, 329 U.S. 90, 112-113 (1946); *E.C.A. v. United States*, 341 U.S. 412, 419 (1951); *Pacific States Box and Basket Co. v. White*, 296 U.S. 176, 181-182, 184 (1935); and *Willapoint Oysters v. Ewing*, 174 F. 2d 676 (9th Cir. 1949), cert. denied 338 U.S. 860 (1949).

Sand Co., 325 U.S. 410 (1945), where the Supreme Court said:

"The problem in this case is to determine the highest price respondent charged for crushed stone during March, 1942, within the meaning of Maximum Price Regulation No. 188. Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." (325 U.S. at 413-414)

Even without the aid of this principle, it is clear that the regulation was properly applied. Section 205(e) of the Act requires the Secretary to establish standards of identity for the various types of distilled spirits. The standard or class involved here is defined as follows:

"Class 1, Neutral Spirits or Alcohol. 'Neutral spirits' or 'alcohol' are distilled spirits distilled from any material at or above 190° proof, whether or not such proof is subsequently reduced." (27 C.F.R. § 5.21(a))¹⁹

The regulation with which we are concerned, by its simple terms and without exception, encompasses the whole range of neutral spirits distilled over 190° proof:

*"Age, maturity, or similar statements or representations as to neutral spirits * * * are misleading and are prohibited from being stated on any label."* (27 C.F.R. § 5.39(d))

This regulation is applicable regardless of whether the particular neutral spirit is the worst in its class or, as is

¹⁹ The Act requires that labels disclose the percentage of neutral spirits contained in blended or rectified distilled spirits (§ 205(e)).

here alleged, an improved neutral spirit. Improved or unimproved, appellant's product is a neutral spirit.

Moreover, the regulation was intended to be applied to neutral spirits stored like appellant's in reused whiskey barrels. The notices of hearing and the hearing records show this. Mr. Lind's testimony at the 1956 hearing is conclusive on this point (J.A., Vol. II, pp. 154A-156A). Since appellant alleges that its product is a neutral spirit stored in wood, there can be no question but that the regulation applies to appellant's neutral spirits and that it was intended to do so.

Finally, appellant's proposed labeling statement is an "age" representation within Section 5.10(j) of the regulations. This Court so held when it discussed a label which stated "stored 6 years in reused cooperage":

"The required label gives a truthful statement of *age* and of manner of storage during the aging period, * * *." *Continental Distilling Corporation v. Humphrey*, 101 U.S. App. D.C. 210, 212 (1957).

Appellant has constantly referred to its storage process as a method of aging neutral spirits. Its representative at the 1956 hearing did this (J.A., Vol. II, pp. 154A-155A); as has the president of Calvert (Id., pp. 99A, 102A):

"* * * Going further, Edgar M. Bronfman, Calvert president, says that *aged spirits*, used for the first time in American whiskey, have taken the hardness out of hard liquor * * *." ²⁰

From these facts it is clear that appellee Avis had no alternative but to apply the clear and unambiguous regulation to the appellant's neutral spirits. In so doing, he

²⁰ Such "age" statements also are being made by appellant's salesman to wholesale and retail dealers (J.A., Vol. II, p. 99A). Such statements demonstrate the consumer confusion and deception which the regulation seeks to avoid, for even the appellant, except in the pleadings in this case, makes no distinction between "storage" and "age" claims.

treated appellant's product in exactly the same manner as all other products in its class. This fact alone distinguishes this case from the *Continental* case where unequal treatment of similar products was alleged, but, in the end, not proved. Unlike *Continental*, the appellant here is seeking to become the beneficiary of unequal treatment.

B. The Application of the Regulation Was Neither Erroneous, Arbitrary Nor Capricious

The theme of appellant's argument is that the prohibited labeling statements are in all respects true and not misleading and that appellant did not have an opportunity to present evidence on its contentions before the administrative agency. The last contention is so obviously without merit as to require little comment. The fact is that appellant had ample opportunity either at the 1956 hearing or in its application to present its contentions. Even after denial of its application, the appellant could have sought reconsideration or review by the Commissioner of Internal Revenue or the Secretary of the Treasury, who has the ultimate responsibility in labeling matters. In addition, the appellant could have petitioned for relief under the Administrative Procedure Act (5 U.S.C. §§ 1003(d) and 1004(d)) and the agencies regulations (26 C.F.R. § 601.601 (c)). The appellant's failure to take any of these steps is the full answer to its contention that it was never afforded a forum in which to present its contentions.

Assuming, *arguendo*, for the purpose of this and the following discussions only, that the appellant's labeling statements are true and not misleading, the critical fact is that the appellant made no effort to present its "facts" and "contentions" to appellees, the expert body Congress created to deal with these problems. It is indeed anomalous for appellant to rely on undisclosed facts to support a charge of arbitrary and erroneous action. The due process concept works both ways and the burden was on appellant

to reveal its facts at the agency level. Since it did not do so, there is no conceivable way by which the Avis ruling can be deemed to be arbitrary, capricious, and erroneous.

It is an elementary principle that regulations promulgated after extensive administrative hearings will not be overturned by the Court unless the complaining parties set forth reasons in their application sufficient to justify a change or waiver of the rules. In *United States v. Storer Broadcasting Company*, 351 U.S. 192 (1955), the Court discussed the showing required of an applicant faced with a rule barring relief:

“ * * * As the Commission has promulgated its Rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. * * * ”
(351 U.S. at 205).

The recent case of *Federal Power Commission v. Texaco Inc.*, — U.S. —, 12 L. ed. 2d 112 (32 L.W. 4370, 1964), is to the same effect. There the Commission, after giving interested parties notice and opportunity to submit views in writing, but no hearing, adopted regulations providing that contracts containing certain types of escalation pricing clauses would be rejected out of hand if they were the subject of an application for a certificate of public convenience and necessity. Applications containing the prohibited pricing clauses were filed and rejected without hearing because of the regulation. The Supreme Court, in reversing the Court of Appeals, held that the Commission was not prevented from:

“ * * * particularizing statutory standards through the rule-making process and *barring at the threshold* those who neither measure up to them nor show reasons why in the public interest the rule should be waived.”
(32 L.W. at p. 4372)

The Court also passed on a contention that the rule making proceeding deprived the applicant of a hearing under the statute. The Court held:

"The only hearing to which Pan American so far has been entitled was given when the regulations in question were adopted pursuant to § 4(b) of the Administrative Procedure Act." (32 L.W. at p. 4373)

The Supreme Court, in both the *Storer* and *Texaco* cases, noted that there were administrative procedures whereby an applicant could request "a waiver of the rule complained of." As already noted, this procedure was also available to the appellant here.

A major factor in both of these cases is the requirement that the applicant must carry the burden of making its position known to the agency. Appellant's bare-bones application did not contain any reasons "to justify a change or waiver of the rule" (J.A., Vol. II, pp. 113A-115A). Moreover, even after the *Avis* ruling, there was nothing to prevent appellant from making a full disclosure and seeking reconsideration of the adverse ruling. Its failure cannot be converted into an asset and charged to appellees, who were never alerted to appellant's contentions.

Therefore, the regulation was validly applied and the *Avis* ruling was neither arbitrary, capricious, nor erroneous.

III.

APPELLANT IS NOT ENTITLED TO A DE NOVO TRIAL

Appellant acted deliberately and with full knowledge of the regulation which is now nearly thirty years old. Its failure to pursue available administrative remedies cannot be used as the basis for a trial *de novo*. The appellant has been accorded all the rights to which it is entitled and it did not pursue additional rights it possessed. Accordingly, the twin doctrines of exhaustion of administrative remedies and primary jurisdiction are applicable.

A. Appellant Has Not Exhausted Its Administrative Remedies

To summarize, the record before this Court shows that the appellant's bare-bones application for a certificate of label approval did not raise the issues now urged upon this Court (J.A., Vol. II, pp. 113A-114A); that appellant neither requested a hearing in connection with its application nor sought reconsideration of the notice of denial; and that appellant never petitioned for relief under the available administrative procedures (J.A., Vol. II, p. 109A). Moreover, the administrative record shows that the appellant offered no expert testimony in favor of its position at the 1956 hearing, even though it began its study of the effect on neutral spirits of storage in wood in 1949 (J.A., Vol. I, p. 65A), and even though its representative at the hearing spoke of "aging neutral spirits in wood" and made references to "technological improvements." (J.A., Vol. II, p. 155A)

These circumstances require application of the exhaustion doctrine as set forth in *Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41, at 50-51 (1938); *United States v. L. A. Tucker Truck Lines*, 344 U.S. 33, at 37 (1952); and *Unemployment Compensation Commissioner v. Aragon*, 329 U.S. 143, at 155 (1946).

Both the *Tucker* and *Aragon* cases involve factual situations where issues not raised before the administrative bodies were raised for the first time in subsequent court proceedings. In both cases, the Supreme Court held that such new issues would not be entertained. The Court in the *Tucker* case said:

"We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. It is urged in this case that the Commissioner is obliged to deal with a large number of like

cases. Repetition of the objection in them might lead to a change of policy, or, if it did not, the Commission would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence. Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." (344 U.S. at 36-37; footnotes citing cases are omitted)

This principle is equally applicable here. Therefore, this Court should either affirm the court below or order the complaint dismissed because of appellant's failure to exhaust its administrative remedies.

B. The Doctrine of Primary Jurisdiction Is Applicable

The doctrine of primary jurisdiction, which is applicable to the relationship between courts and federal administrative bodies, was aptly defined in *United States v. Western Pacific Railroad Co.*, 352 U.S. 59 (1956),²¹ where the Supreme Court was concerned with a case involving the tariff to be applied to the transportation of steel aerial bomb cases filled with napalm gel. The Court held:

"The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which,

²¹ Annotated at 1 L. Ed. 2d 1596.

under a regulatory scheme, have been placed within the special competence of an administrative body; * * *". (352 U.S. at 63-64)²²

The Supreme Court said that while there was no fixed formula for applying the doctrine, it was particularly applicable where the litigation presents issues of fact not within the conventional experience of judges and there is need for uniformity of decision and specialized consideration. The Court, relying on *Far East Conference v. United States*, 342 U.S. 570, 574 (1952), said:

"* * * The two factors are part of the same principle, 'now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over * * *'." (352 U.S. at 643)

Finally, the Court held that:

"* * * the question of tariff construction, as well as that of the reasonableness of the tariff as applied, was within the exclusive primary jurisdiction of the Interstate Commerce Commission." (352 U.S. at 643)

The primary jurisdiction doctrine permits the Court to either "* * * order the case retained on the District Court docket pending, the Board's action, * * * or order dismissal of the proceeding brought in the District Court." *Far East Conference v. United States*, *supra*, at 576-577 and *Pan American Airways, Inc. v. United States*, 371 U.S. 296 (1963). In the *Far East Conference* case, the Supreme Court in the following language, ordered dismissal of the suit.

"* * * We believe that no purpose will here be served to hold the present action in abeyance in the District

²² *California v. Federal Power Commission*, 369 U.S. 482 (1962), is an example of a case within the primary exclusive jurisdiction of the courts.

Court while the proceeding before the Board and subsequent judicial review or enforcement of its order are being pursued. A similar suit is easily initiated later, if appropriate. Businesslike procedure counsels that the Government's complaint should now be dismissed, as was the complaint in *United States Navigation Co. v. Cunard S.S. Co.*, 284 US 474, 76 L ed 408, 52 S Ct 247, *supra*." (342 U.S. at 577)

The instant case calls for this application of the doctrine.

Clearly, Congress has confided the subject matter of this suit to the discretion of the Secretary of the Treasury. It is not necessary to go beyond the comprehensive regulations (27 C.F.R. Part 5) and the Appellant's affidavits (J.A., Vol. I, pp. 63A-78A) to conclude that the determination of the "factual issues" (which, of course, are contradicted by the evidence presented at the formal hearings) calls for the application of specialized knowledge and the exercise of discretion by the Secretary of the Treasury. These circumstances demonstrate the wisdom of the primary jurisdiction doctrine and make it clear that this Court should affirm the court below or order dismissal of the complaint.

This orderly procedure would afford appellant the opportunity to petition for an amendment to or repeal of Section 5.39(d). In turn, all interested parties would be assured of their statutory right to notice and hearing under Section 205 of the Act, a right which appellant is trying to short-circuit by seeking a judicial amendment of the regulation.

That this is at once both the logical and judicial answer is manifest from the fact that the affirmative relief appellant seeks will not be granted by this Court. The *Continental* case held:

"* * * that the Court cannot substitute its judgment for that of the administrative agency and devise the appropriate regulations or labeling." (101 U.S. App. D.C., at 211)

C. The Cases Cited By Appellant Do Not Require a De Novo Trial or Reversal of the Lower Court's Decision

In support of its argument that summary judgment was improperly granted, the appellant relies on *Continental Distilling Corporation v. Humphrey*, 95 U.S. App. D.C. 104, 220 F. 2d 367 (1954); *Friend v. Lee*, 95 U.S. App. D.C. 224, 221 F. 2d 96 (1955); and *Armour & Co. v. Freeman*, 113 U.S. App. D.C. 37, 304 F. 2d 404, cert. denied, 370 U.S. 920 (1962). These cases all have something in common—they do not require this court to reverse the lower court's order granting summary judgment.

The *Continental* case was an appeal from the grant of a *motion to dismiss* based on the failure of the complaint to state a claim upon which relief could be granted. Unlike the instant case, the Court in *Continental* did not have the formal administrative record before it and it was not advised of the reasons for the regulation. Even so, the Court severely restricted the scope of the complaint. It held that such standard allegations as arbitrary, capricious, and erroneous action, action beyond the scope of the statute, and action inconsistent with the statutory purposes did not state a claim upon which relief could be granted. The Court, in reaching this conclusion, relied on *Pacific States Box and Basket Co. v. White*, 296 U.S. 176 (1935), where the Supreme Court, in affirming the dismissal of a complaint, held that:

“* * * where the regulation is within the scope of the authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. * * *” (296 U.S. at 185-186)

The *Continental* case did hold that the allegation of arbitrary discrimination between whiskies “which are similar in respects pertinent to appropriate marketing practices” was sufficiently specific to “call for solution through pro-

cedures other than dismissing the complaint on motion.” (95 U.S. App. D.C. at 109)

The appellant here has not raised a substantial claim of arbitrary discrimination. To the contrary, it is seeking a judicial amendment to the regulation which will grant its neutral spirits preference over all other distilled spirits of the same class.

Finally, the *Continental* case did not hold that a trial *de novo* was required. The point which troubled the Court was that it did not know and could not pass on the reasons justifying the apparent discrimination. The Court said:

“There well may be justifiable reasons for this. But they are neither matters of which we can take judicial notice nor of common knowledge so far as we are cognizant.” (Id., at 109)

Obviously, if the formal administrative records had been before the Court, as they are here, the Court, with full knowledge of the reasons for the apparent discrimination, could have based its decision on that knowledge.

In *Friend v. Lee*, the Court was concerned with an appeal from an order granting a *motion to dismiss* on the ground that appellant had no standing to sue. The record before the Court did not show there had been notice and public hearing preceding the issuance of the regulation involved, and, therefore, the reasons supporting the regulation were not available to the Court. The Court found that a *prima facie* case of discrimination was alleged and held that the “District Court erred in dismissing plaintiff’s complaint insofar as it seeks an injunction against arbitrary interference with the delivery of driverless cars by defendants”. The Court clearly stated that this conclusion was predicated “on the facts before us”.

The facts before this Court fully justify Section 5.39(d), which was issued after notice and public hearing and is further supported by subsequent formal hearings. Thus, on

this record, the Court below was fully advised and its grant of summary judgment was proper.

The *Armour* case involved an appeal from an order denying a preliminary injunction and a motion for an *en banc* rehearing of a motion to extend time within which to file a petition for rehearing. In a 5-4 decision the court denied the latter motion after the 3 judge division had, on "the papers before us" directed the issuance of a preliminary injunction. The proceedings in this Court did not involve a motion for summary judgment and there is no indication that the formal records of the agency's hearings were before the Court. As in the previous cases relied on by the appellant, the issue of a *de novo* trial was not discussed by the Court and there is nothing in the opinion which would have prevented a subsequent motion for summary judgment based on the administrative records.

CONCLUSION

It has been demonstrated that the Avis ruling is not erroneous, arbitrary, or capricious and that the regulation is valid and reasonable under the Act.

When appellant, in 1958, commenced storing neutral spirits in used whiskey barrels it well knew that the regulations, for some twenty-five years, had prohibited age claims for such neutral spirits.

Appellant was afforded two specific opportunities to support an amendment to the regulation which would have permitted the labeling statements it now seeks to make. In addition, it had a continuing opportunity to seek repeal or amendment under the administrative regulations and the Administrative Procedure Act.

Notwithstanding these opportunities, the appellant elected to store its neutral spirits in reused cooperage and sit back until it was ready to market its product. It now seeks a judicial amendment to the regulations. As shown

in all of the foregoing, this relief is not called for in the circumstances of this case.

Accordingly, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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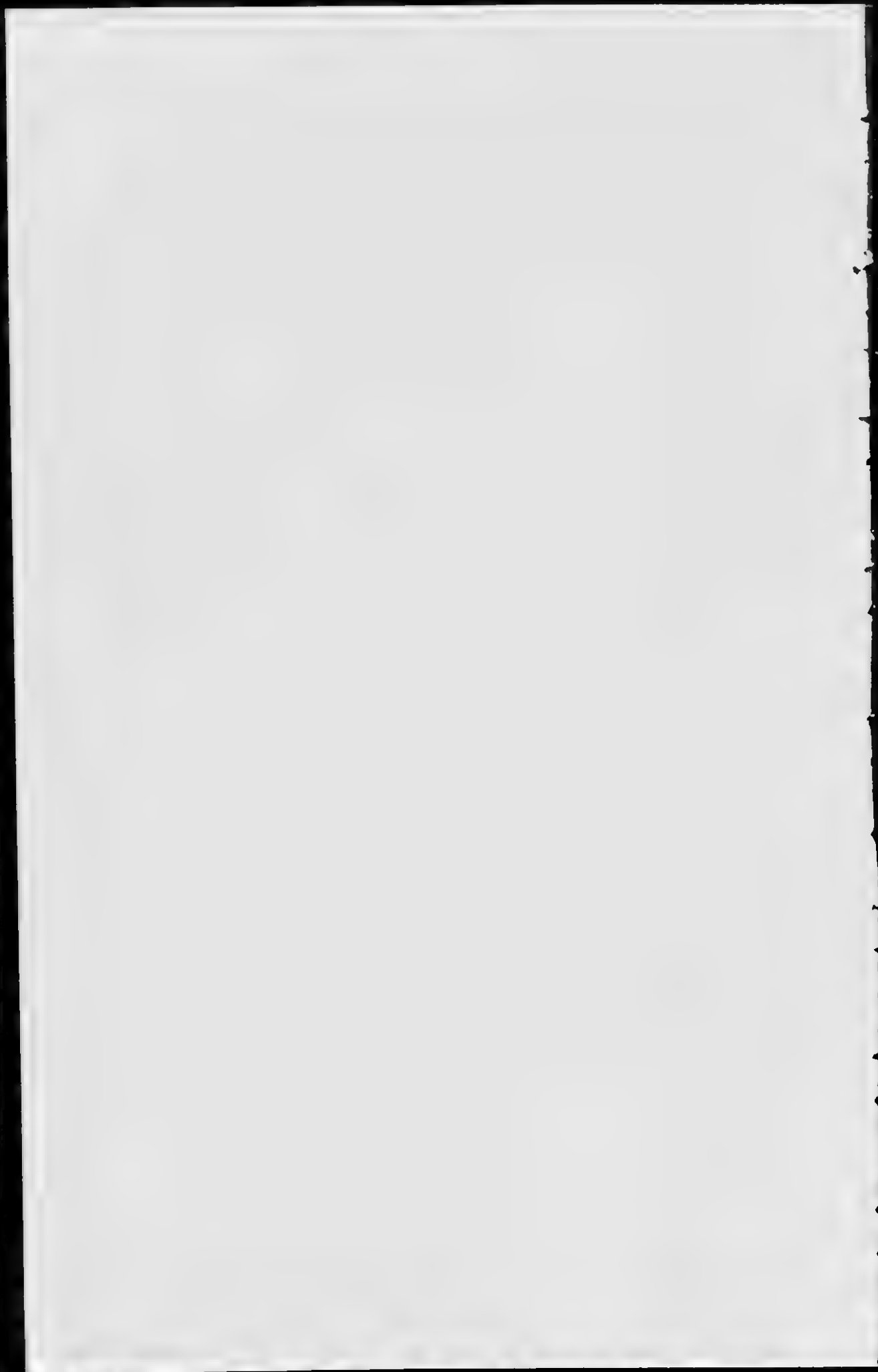
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APPENDIX

Pertinent Provisions of the Statutes and Regulations Involved

Federal Alcohol Administration Act, 27 U.S.C. § 205:

It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

* * *

(e) Labeling. To sell or ship or deliver for sale or shipment or otherwise introduce in interstate or foreign commerce, or to receive therein, or to remove from customs custody for consumption, any distilled spirits, wine, or malt beverages in bottles, unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding, and labeling and size and fill of container (1) as will prohibit deception of the consumer with respect to such products or the quantity thereof and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guarantees, and scientific or irrelevant matters as the Secretary of the Treasury finds to be likely to mislead the consumer; (2) as will provide the consumer with adequate information as to the identity and quality of the products, * * * (3) as will require an accurate statement, in the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification, if neutral spirits have been used in the production thereof, informing the consumer of the percentage of neutral spirits so used and of the name of the commodity from which such neutral spirits have

been distilled, or in case of neutral spirits or of gin produced by a process of continuous distillation, the name of the commodity from which distilled; (4) as will prohibit statements on the label that are disparaging of a competitor's products or are false, misleading, obscene, or indecent;

* * *

The District Courts of the United States, and the United States court for any Territory shall have jurisdiction of suits to enjoin, annul, or suspend in whole or in part any final action by the Secretary upon any application under this subsection; * * *

Federal Alcohol Administration Act, 27 U.S.C. § 205, unnumbered paragraph following section (f):

The Secretary of the Treasury shall give reasonable public notice, and afford to interested parties opportunity for hearing, prior to prescribing regulations to carry out the provisions of this section.

Administrative Procedure Act, 5 U.S.C. 1003(d):

(d) Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

Administrative Procedure Act, 5 U.S.C. 1004(d):

(d) The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

Title 26 C.F.R. § 601.307:

Rulings. Any person who is in doubt as to any matter arising in connection with his operations or transactions with respect to liquors may request a ruling thereon by addressing a letter to the Director, Alcohol and Tobacco Tax Division, Internal Revenue

Service, Washington 25, D.C., or to the assistant regional commissioner (alcohol and tobacco tax) of the region in which his business is located.

Title 26 C.F.R. § 601.601(c):

Petition to change rules. Interested persons are privileged to petition for the issuance, amendment, or repeal of a rule. A petition for the issuance of a rule should identify the section or sections of law involved; and a petition for the amendment or repeal of a rule should set forth the section or sections of the regulations involved. The petition should also set forth the reasons for the requested action. Such petitions will be given careful consideration and the petitioner will be advised of the action taken thereon. Petitions should be addressed to the Commissioner of Internal Revenue, Washington 25, D.C., Attention: T:P.

27 C.F.R. § 5.10(j):

Age. "Age" means the period during which, after distillation and before bottling, distilled spirits have been kept in oak containers, charred if for a whisky of American type other than corn whisky, straight corn whisky, blended corn whisky, or a blend of straight corn whiskies. In the case of American type whiskies produced on or after July 1, 1936, other than corn whisky, straight corn whiskies, blended corn whisky, and blends of straight corn whisky "age" means the period during which whisky has been kept in charred new oak containers.

Title 27 C.F.R. § 5.21(a):

Standards of identity for the several classes and types of distilled spirits set forth in this part shall be as follows:

(a) *Class 1; Neutral spirits or alcohol.* "Neutral spirits" or "alcohol" are distilled spirits distilled from

any materials at or above 190° proof, whether or not such proof is subsequently reduced.

Title 27 C.F.R. § 5.21(b):

Class 2; Whisky. "Whisky" is an alcoholic distillate from a fermented mash or grain distilled at less than 190° proof in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to whisky and withdrawn at not more than 125° proof for bottling without storage in barrels, or reduced to not more than 125° proof prior to storage in barrels, and bottled at not less than 80° proof; and also includes mixtures of the foregoing distillates for which no specific standards of identity are prescribed in this part: * * *

Title 27 C.F.R. § 5.21(b)(7):

(7) "Blended whisky" (whisky—a blend) is a mixture which contains at least 20 percent by volume of 100° proof straight whisky and, separately or in combination, whisky or neutral spirits, if such mixture at the time of bottling is not less than 80° proof.

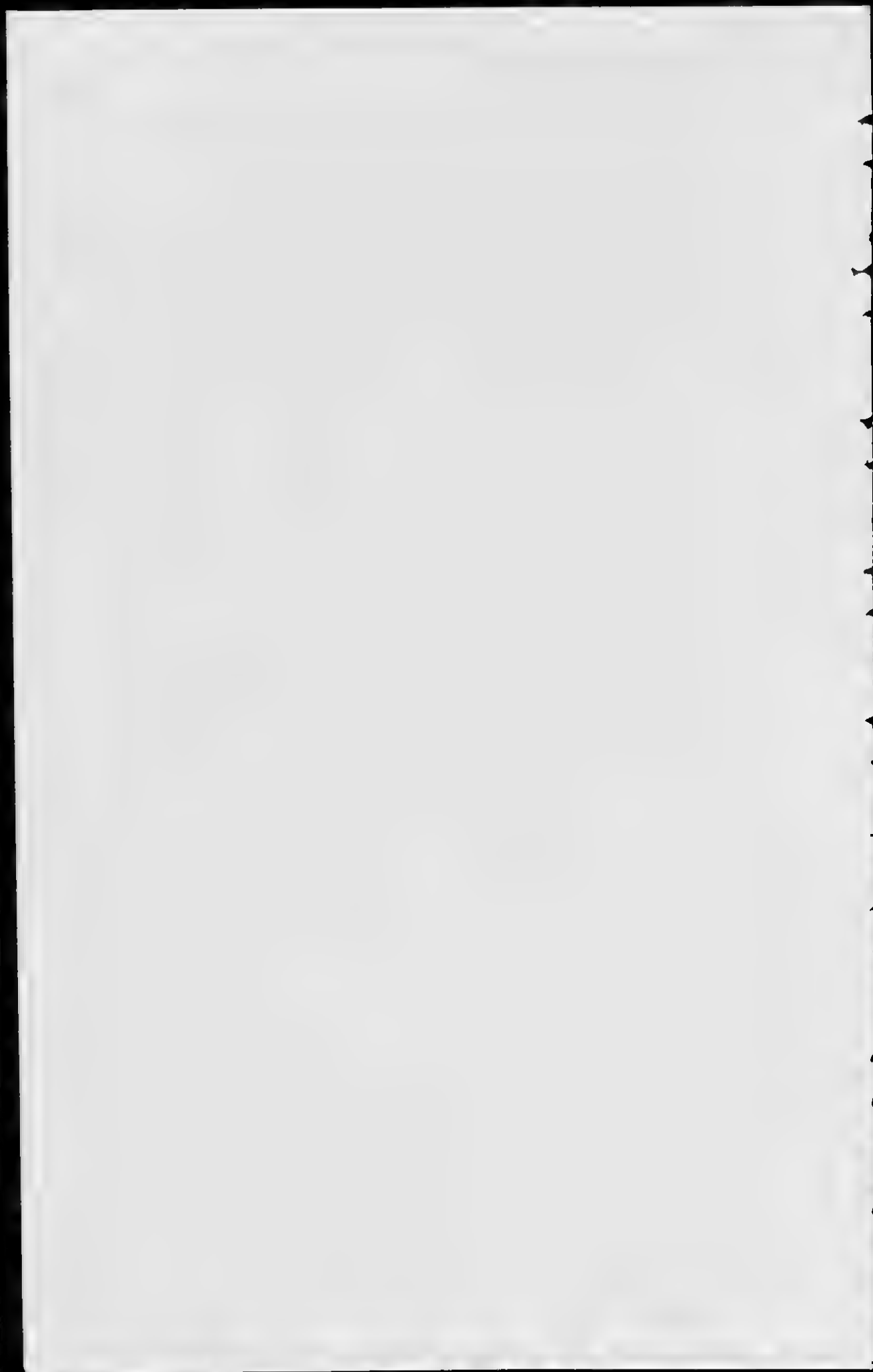
Title 27 C.F.R. § 5.39(d):

Age, maturity, or similar statements or representations as to neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs, bitters, and specialties are misleading and are prohibited from being stated on any label.

Title 27 C.F.R. § 5.39(e)(5):

Age, maturity or similar representations as to neutral spirits, gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs, and bitters, are misleading, and shall not appear upon any label, except that the use of the word "old" or other word denoting age, appearing as

part of the brand name, shall not be deemed to be an age representation in the case of such distilled spirits, or in the case of distilled spirits bottled in bond under the Bottling in Bond Act of the United States, or in the case of whiskies and brandies (except immature brandies) as are not required to bear a statement of age on the label or in the case of rum which has been aged for not less than 4 years. As to all other distilled spirits the word "old" or other word denoting age, appearing as part of the brand name, shall be deemed to be an age representation unless the word "brand" appears in direct conjunction with such brand name in letters of equally conspicuous color and at least one-half the size of the type in which such brand name is printed.



FILED MAR 15 1965

Nathan J. Paulson
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18465

JOSEPH E. SEAGRAM & SONS, INC., PLAINTIFF/APPELLANT

v.

HONORABLE DOUGLAS DILLON, ET AL., GOVERNMENT
DEFENDANTS/APPELLEES

and

NATIONAL DISTILLERS AND CHEMICAL CORPORATION, ET AL.,
INTERVENORS/APPELLEES

GOVERNMENT APPELLEES' PETITION FOR REHEARING

Come now Government appellees by their attorney, the United States Attorney for the District of Columbia, and respectfully petition for rehearing in this case.

STATEMENT

This petition is directed to remarks made in the *per curiam* opinion herein which vitally concern two fundamental administrative law issues: (1) Proper agency-court relations under the separation-of-powers principle of the Constitution. (2) The "rule of law" principle governing proper administrative action.

Because the fundamental issues raised by the Court's remarks are of far-reaching importance, this petition—coming from the prevailing Government parties—urgently seeks to prompt the Court to reconsider its observations going beyond the holding in the case. We are mindful of the editorial strictures of Rule 26 of the General Rules of this Court. However,

the fundamental propositions now treated were not earlier dealt with by Government appellees for the reason that their validity was assumed to be beyond doubt. And, in view of the general impact of the remarks made in the *per curiam* opinion, Government appellees believe it is now necessary to fully explicate their understanding of the well-established legal doctrines they think govern.

Government appellees concur with the Court's holding that the doctrine of exhaustion of administrative remedies applies here. But, in venturing beyond that holding, we think the Court inadvertently intruded into the sphere of competence Congress has by statute assigned to the Secretary of the Treasury, and did not give effect to the Secretary's responsibility to act within his sphere of competence as required by law.

In respectfully petitioning the Court to reconsider the remarks made in the course of its opinion, we are confident that the basic principles we set forth herein will lead the Court to reconsider, and withdraw or restate its remarks in accord with established legal doctrine.

The Separation-of-Powers Principle Involved. In its *per curiam* opinion, the Court voiced the proposition that a *de novo* judicial proceeding can lie here to furnish "opportunity for proof or disproof of the factual allegations." (Slip op., p. 5.) As discussed *infra*, we believe that the conduct of such a *de novo* judicial trial of the facts would clearly encroach upon the legislative fact-finding and policy-determining administrative authority which Congress has here expressly confided by the statute to the Secretary of the Treasury—not to the Courts. Where neither the statute nor the Constitution so requires, it is not within the judicial competence to hold a *de novo* judicial trial of the facts when conducting limited judicial review of administrative action simply to determine that the agency's action is not in excess of its statutory authority.¹

The Rule-of-Law Principle Involved. In its further discussion, the Court did not give proper effect to the Secretary's

¹ "We [judges] can abdicate our judicial function by usurpation just as well as by abandonment to administrative agencies." Judge Philip J. Finnegan, concurring in the decision of the Court of Appeals for the Seventh Circuit, on rehearing by the Court *en banc*, in *G. H. Müller & Co. v. United States*, 280 F. 2d 286, 297, 300 (1958), *cert. denied*, 359 U.S. 907 (1959).

statutory responsibility to act as required by law within the sphere of administrative competence assigned him by Congress. (Slip op., pp. 4-5). As developed below, the Secretary is bound by law to apply his own regulations (unless and until changed in proper rule-making proceedings as required by the statute), in taking adjudicatory action upon appellant Seagrams' application for label approval.² And he is also bound by law to give fair consideration to amending his own regulations (either *sua sponte*, or on petition of an interested party) "if time and changing circumstances" indicate that amendment is desirable in the public interest.

In light of the controlling precepts set forth in our Argument below, we think the Court should now consider:

(1) The proper spheres of authority which Congress has assigned the Secretary of the Treasury, and the Courts, respectively, in the administration of the labeling provisions in the Federal Alcohol Administration Act, and confinement of possible future court action in this case to the lawful sphere of judicial competence.

(2) The inescapable interrelation between the legislative rule-making process and adjudicatory proceedings under the labeling provisions in the Federal Alcohol Administration Act, where —

(i) Congress has by statute required that all interested parties be afforded notice and opportunity to participate in the legislative rule-making process, and has charged the agency with responsibility to apply its expertise and judgment, and to issue legislative regulations to govern the matter in order to achieve the statutory objectives.

(ii) Neither the statute nor constitutional due process of law requires that an adjudicatory trial-type hearing

² This Court has stated in its *per curiam* opinion that "the process of issuing a certificate of label approval is a 'licensing' procedure." (Slip op., p. 3.) In that connection, the first *Continental Distilling Corp.* case, 95 U.S. App. D.C. 104, 109, 220 F. 2d 367, 372 (1954) is apposite. There, this Court (per Fahy, J.), in rejecting Continental's claim that denial of a certificate of label approval "deprived it of a license without due process of law," stated:

"* * * But the earlier * * * [grant of label approval] * * * was in no sense a license. Quite independently Continental was * * * engaged

be held in connection with an application such as is involved in this case.

(iii) Such application clearly contravenes the outstanding regulation, and necessarily must be denied by the agency so long as the regulation remains in effect.

(iv) The prescribed statutory procedure for effecting amendments to the controlling regulation is available as a proper means of accomplishing a fair and just disposition of the matter in the interest of all parties affected by, and conducting their businesses in accordance with, the terms of that regulation.

BACKGROUND AND FACTS

The Federal Alcohol Administration Act makes provision for the regulation of the liquor industry to prevent unfair competition and to protect the consumer from false or misleading labeling of liquor bottles and advertising. It reposes in the Secretary of the Treasury—not in the Courts—the duty and responsibility to exercise *his* judgment and discretion, in determining “what statements relating to age, manufacturing processes * * * and * * * irrelevant matters” are “deceptive” or “likely to mislead” the consumer.* The Secretary’s delegates have through long experience in the regulation of the Distilled Spirits industry acquired expertise in this regulatory field.

in its business and has so continued. A particular method of carrying on this business * * * was subjected to regulation for purposes of preventing consumer deception * * *.”

We think the view expressed in the first *Continental Distilling Corp.* case is correct, and that what we are concerned with here is not a matter of “licensing”, as that term is generally understood, but rather is regulation of a mere incident of a going business. Nevertheless, for purposes of present discussion, we are proceeding *arguendo* on the assumption that we are concerned here with a “licensing” procedure. Even on that assumption, it must be clearly understood that this matter is in the nature of an application for an “initial license” which has no basic effect upon the right of appellant Seagram to continue carrying on its business as a distiller, and that the licensing is but regulation of an incident of such business in the interest of preventing consumer deception. This point is further discussed under Point II of our Argument *infra*.

* Section 5(e) of the Act, 27 U.S.C. 205(e).

Further—and most importantly—we read the labeling provisions in the Act as specifically requiring that the Secretary include in his regulations the legislative “findings” and policy determinations he makes in this connection, so that the entire Distilled Spirits industry can know and be guided as to statements on bottle labels “relating to age, manufacturing processes * * * and * * * irrelevant matters” which the Secretary has ruled “deceptive,” or which, *irrespective of their truth or falsity*, the Secretary of the Treasury has ruled “likely to mislead the consumer.”⁴

The Act further expressly directs that “prior to prescribing regulations to carry out” the labeling provisions in the Act, the Secretary “shall give reasonable public notice, and afford to interested parties opportunity for hearing.”⁵ Such “hearing” refers to legislative rule-making proceedings within the first provision in Section 4(b) of the Administrative Procedure Act, 5 U.S.C. 1003(b), which requires only that—

* * * After notice [published in the Federal Register]
* * * the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner * * *. [Bracketed material supplied.]

This provision is implemented by 26 C.F.R. 601.601 (revised 1961), which describes the rule-making procedures of the Internal Revenue Service. Subsection (c) states that petitions to change the rules “will be given careful consideration and the petitioner will be advised of the action taken thereon.”

As for the adjudicatory action to be taken upon an application for label approval, the Act specifies merely that the distiller “upon application to the * * * [Secretary] * * * obtain * * * a certificate of label approval * * * issued by the

⁴ The Secretary’s function clearly is here essentially legislative in nature. His substantive regulations fill in the details of the legislative program under the statutory standards prescribed by Congress, and have the force and effect of general law.

⁵ See *UNA Chapter, Flight Eng. Int. Assn. v. National Mediation Board*, 111 U.S. App. D.C. 121, 125, 294 F. 2d 905, 909, cert. denied, 368 U.S. 956 (1962).

Secretary in such manner and form as he shall by regulations prescribe." No provision is made in the statute for an adjudicatory "hearing" of any nature to be held in connection with the grant or denial of an application for label approval.

In conferring judicial review jurisdiction upon the District Courts, the Act states only that the Courts "shall have jurisdiction of suits to enjoin, annul, or suspend in whole or in part any final action by the Secretary upon any application" for label approval. The Act is significantly silent in respect of conferring *any* jurisdiction upon the Courts to conduct a *de novo* judicial trial of the facts in the matter.

The Labeling Regulations governing the application for approval of a certificate of label approval designate the form of application for such approval, and state simply that a certificate of label approval shall be issued "upon application made on the form designated." * They likewise made no provision for any adjudicatory "hearing" of any nature to be held on the application.

The challenged provision in the Labeling Regulations incorporating the Secretary's legislative finding that "age, maturity, or similar statements or representations as to neutral spirits * * * are misleading," and the prohibition against any such statement appearing on any bottle label, was issued in 1936. It was promulgated after due notice was given, and legislative rule-making proceedings conducted. All this was done in full accord with the statutory mandate.

Consideration was thereafter given by the Secretary's delegate to changing this regulation in 1948 and 1956 at legislative rule-making proceedings. Following each of those proceedings, the Secretary's delegate determined that no change should be made in the regulation. All this too was done in full accord with the statutory mandate.

Appellant Seagram was afforded equal opportunity with all other members of the Distilled Spirits industry to participate through submission of written data, views, etc., in the rule-making proceedings held in 1935, prior to issuance of the regulation, and thereafter held in 1948 and 1956, to consider amending it.

* 27 C.F.R. 5.50(a) (revised 1961).

Appellant Seagram participated in each of those legislative rule-making proceedings.

The immediate controversy here has arisen in the following way. Appellant Seagram submitted to the Secretary's delegate an application for approval of a proposed label for blended whiskey containing neutral spirits.⁷ This proposed label made "age, maturity or similar statements" for the neutral spirits which are prohibited by the regulation. Appellant Seagram advanced no claim before the Secretary's delegate in connection with this application for label approval that its neutral spirits were in any way different from traditional neutral spirits. Nor did appellant Seagram make any claim before the Secretary's delegate that an exception to the blanket prohibition set forth in the regulation was warranted. Nor did appellant Seagram accompany its label application with any evidentiary materials whatever to indicate to the Secretary's delegate that the making of such an exception by amendment of the regulation should be considered.

The application on its face showed that the proposed label contravened the outstanding regulation. And so the Secretary's delegate had to deny it. It could not be treated as a petition to amend the outstanding regulations (1) because it asked for no such relief; and (2) because it was not supported by any evidentiary materials indicating that amendment to the regulations should be considered *sua sponte* by the Secretary's delegate.

Appellant Seagram thereupon instituted this present lawsuit. In its complaint, appellant Seagram *for the first time* attacked the regulation as being "null and void" because "it exceeds the powers granted to the Secretary by the statute."

⁷ We assume for purposes of present discussion that appellant Seagram's neutral spirits are entitled to be called "neutral spirits" despite the claim that they have been distilled in a manner that retains unneutral, flavor-producing whiskey characteristics in the neutral spirits after distillation. As discussed *infra*, this alleged new method of distilling unneutral "neutral" spirits, if true, raises a policy question for consideration at future legislative rule-making proceedings whether a new and different standard of identity and designation other than "neutral spirits" should be prescribed for them in the consumer's interest, to distinguish them from truly neutral spirits.

(Complaint, par. 14, J.A. 13A.) *For the first time* appellant Seagram there raised a claim that the "age, maturity or similar statements" made on its proposed label in respect of its neutral spirits would not be misleading to the consumer. And *for the first time* appellant Seagram there proffered evidentiary materials in support of its claim.

POINTS OF AGREEMENT WITH PER CURIAM OPINION

We fully concur with the Court's holding that the doctrine of exhaustion of administrative remedies applies here, and that appellant Seagram must proffer its claim and supporting evidentiary materials to the Secretary for *his* consideration. We believe that holding is manifestly correct.

Going further, however, the Court thought it was obliged to fashion a new "procedural step" here "to meet the requirements of justice and basic principles." Therefore, instead of dismissing the action, the Court undertook to authorize appellant Seagram to proffer its claim and supporting evidentiary materials to the Secretary's delegate in connection with a petition for reconsideration of the denial of the application for label approval. (Slip op., pp. 4-5.) We have no objection to the Secretary's delegate entertaining such a petition for reconsideration. But, to clarify the point in the long-range interest of proper agency-court relations, we note that there actually was no need for any such direction to be given. After dismissal of the suit for failure to exhaust administrative remedies, appellant Seagram would of course be at liberty to make such a proffer in connection with a petition for reconsideration, or a new application for label approval, or a petition for amendment of the governing regulation. Such applications are regularly made in course of normal administrative routine.

As we understand that Court's further remarks, going beyond its holding and its direction that the Secretary entertain a petition for reconsideration if filed by appellant Seagram, the Court leaves it strictly up to the Secretary to take "what action he deems appropriate" in the matter. (Slip op., pp. 4-6, including fn. 11.) We fully concur that it would then be up to the Secretary to act in accordance with law and to take proper

action in the matter within the sphere of his administrative competence. And we assume that such action extends to *sua sponte* treating the application as warranting the conduct of legislative rule-making proceedings to consider appropriate amendments to the Labeling Regulations, and the holding in abeyance of any adjudicatory action on the application for label approval pending the outcome of such rule-making proceedings.

FUNDAMENTAL QUESTIONS RAISED BY COURT'S REMARKS IN PER CURIAM OPINION

In Government appellees' opinion, the following fundamental administrative law questions are raised by the Court's further remarks in its *per curiam* opinion:

(1) In view of the statutory mandate to the Secretary of the Treasury that his determinations, in respect of preventing consumer deception by barring misleading statements (or statements likely to mislead) on bottle labels, be expressed in a legislative-type regulation, do not the regulations as a fundamental matter of law control the administrative action to be taken on appellant Seagram's application for label approval, unless and until amended in the manner provided in the statute?

(2) In view of (i) the statutory mandate conferring on the Secretary of the Treasury—not on the Courts—authority to make legislative “findings” and to exercise *his* judgment and discretion in the matter, and (ii) the settled constitutional separation-of-powers principle that, where neither the statute nor the Constitution requires a *de novo* trial of the facts in the Court, any *de novo* judicial trial of the facts constitutes an improper invasion of the administrative sphere, should not the Court's suggestion re the possible conduct of “a so-called ‘*de novo*’ proceeding” by the District Court to “furnish opportunity for proof or disproof of the factual allegations” be withdrawn?

Our Argument on these points follows.

ARGUMENT

I. The Labeling Regulations control adjudicatory action to be taken on an application for label approval, until amended as provided in the Federal Alcohol Administration Act; and adequate means are available for effecting amendment to these regulations when and as circumstances warrant.

A. The Act requires that the Secretary of the Treasury express his legislative "findings" and policy-determinations in the Labeling Regulations

The Federal Alcohol Administration^{Act} requires that the Secretary hold legislative rule-making proceedings and afford interested parties due notice and an opportunity to participate in such rule-making through submission of written data, views, etc. The statute further requires that the Secretary then publish his legislative "findings" and policy determinations, in respect of preventing consumer deception by barring misleading statements (or statements likely to mislead) on bottle labels, in the Labeling Regulations.

We presume that Congress required that the Secretary make such legislative determinations in rule-making proceedings and incorporate them in the Labeling Regulations, so that all members of the Distilled Spirits industry would (1) be afforded a fair and equal opportunity to be "heard" in respect of these legislative determinations *before* they are published in binding regulations; (2) be enabled to know in advance the "rules of the game" by which their competitive business activities are bound in the interest of preventing consumer deception; and (3) also be afforded a fair and equal opportunity to be similarly "heard" *before* any changes in these "rules of the game" are made, and to modify their competitive business activities as necessary to meet the new business situation produced when any important amendments are made in the outstanding regulations. In any event, this was a legislative judgment made by Congress in the matter.

B. The Labeling Regulations control and are sufficiently flexible to meet the requirements of basic fairness

It is well settled that administrators are bound by the provisions of their own regulations issued pursuant to statutory

mandate. *Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959); *Service v. Dulles*, 354 U.S. 363, 388 (1957); *Ingalls v. Zuckert*, 114 U.S. App. D.C. 39, 39-40, 309 F. 2d 659, 659-600 (1962) (fn. 3).

The outstanding Labeling Regulations bar making "age, maturity, or similar statements" in respect of neutral spirits. The District Court determined that appellant Seagram's "proposed label does violate the regulation in question." (J.A. 90A). It is clear as a matter of law that the proposed label does contravene the Labeling Regulations. Those regulations have the force and effect of law. Since the Secretary is bound by his own regulations, he cannot lawfully approve the application, so long as the outstanding Labeling Regulations remain in full force and effect. As noted, the statute requires that legislative rule-making proceedings be held before amendments are made in the regulations, and that all interested parties must be afforded a fair opportunity to participate in such rule-making proceedings through submission of data, views, etc. Furthermore, proper administration requires that amendments to the regulation be in full accord with the statute, and seek to effectuate its basic purposes. Also, since all members of the regulated Distilled Spirits industry have ordered their business affairs in accordance with the "rules of the game" prescribed in the Labeling Regulations, they are fairly to be deemed entitled to have their interests considered when any amendments to the Labeling Regulations are contemplated.

The *per curiam* opinion expresses some concern respecting the possible invalidity of "a regulation which forecloses the making of representations which would be false or misleading if advanced in some circumstances but not in others." (Slip op., p. 6). But there is no warrant for such concern here.

In proper circumstances, an adequate avenue exists for obtaining administrative relief from the regulation, and, if needed, appropriate limited judicial review. Section 4(d) of the Administrative Procedure Act, 5 U.S.C. 1003(d), and 26 C.F.R. 601.601 afford such means here. They provide in substance that any interested person has the right to petition for amendment or repeal of any rule; that the Secretary must give any such petition careful consideration; and that the petitioner will be advised of the action taken thereon. Since the basic "rule

of law" governing administrative actions requires that the Secretary not act arbitrarily or capriciously, and appropriate judicial review lies here, full means are available to insure that the Secretary acts within the bounds of his statutory authority in respect of such petition.

The matter here generally involves manifold considerations of expertise and policy, and application of discretion and judgment, in the proper administration of the labeling provisions in the Act. At the heart of the problem lies this consideration:

"Neutral spirits" by definition are spirits distilled at or above 190° proof. The long-standing industry concept is that neutral spirits are "pure alcohol"—ethyl alcohol made as pure as the distilling art permits. In such traditionally "pure alcohol" not enough flavor-producing substances called congeners (including acids, esters, solids and fusel oil) remain to produce flavor, or chemical interaction, when stored in oak containers (cooperage). On the other hand, whiskey by definition is spirits distilled below 190° proof *in such a manner, however, as to retain "the taste, aroma, and characteristics generally attributed to whiskey."*

If appellant Seagram had chosen to distill the "neutral spirits" contained in its blended whiskey in question below 190° proof in such a manner as to retain the flavor-producing congeners, and stored that product in reused cooperage, it would under the regulations have had to call such spirits "whiskey." And, most importantly, it would have had to label such spirits as being "whiskey stored in reused cooperage." In that event, all of the optional "age" statements appellant Seagram seeks to make for such spirits would have been permissible under the regulations. However, as this Court's opinion in the second *Continental Distilling Company* case^{*} indicates, any statement as to whiskey being "stored in reused cooperage" made on a label adversely affects its marketability.

Appellant Seagram's claim is in substance that by specially controlling the distilling process it is now able to distill over-190°-degree spirits with enough flavor-producing congeners retained—though minute in quantity—to make some flavor

^{*} *Continental Distilling Corp. v. Humphrey*, 101 U.S. App. D.C. 210, 211, 247 F. 2d 796, 797 (1957).

difference after storage in reused cooperage. Appellant Seagram evidently seeks to gain some marketing advantage by making in respect of neutral spirits such a statement as is permitted with respect to whiskey stored in reused cooperage, but is prohibited with respect to neutral spirits.

Thus, one of the main questions requiring application of the administrators' judgment and expertise in this matter is whether it is misleading (or likely to be misleading) to the consumer to permit the same statement which is permissible as to high-proof whiskey—but *which is not made because it hurts consumer acceptance there*—to be made as to unneutral neutral spirits, leading the public to believe such a statement means something significant there because it has not heretofore been permitted to be made in that connection. Other problems also confront the administrators. As set forth in our original brief (fn. 44a, p. 26):

At any future legislative-type hearing looking to possible amendment of the outstanding Regulation, the Secretary's delegates would have to apply their judgment and administrative expertise in a number of important respects, relative to the actual effect, if any, storage in reused whiskey barrels has on neutral spirits: *E.g.* (1) To what extent, if any, do such neutral spirits change as a result of absorption of whiskey characteristics from the whiskey-soaked barrel? * * * (2) To what extent, if any, do chemical changes occur in the stored neutral spirits, such as occur in the aging of whiskey? * * * (3) If it is found that the effect of such storage is significant in either of these respects, should a new and different standard of identity and designation be prescribed, in the consumer's interest, for such changed neutral spirits, to distinguish them from truly neutral spirits? * * * (4) Are such changes, if any, sufficiently like those occurring in the aging of whiskey, so that an "age claim" made with respect to them would not mislead (or be likely to mislead) the consumer, or are the changes, if any, resulting from such storage so insignificant that a labeling reference thereto would mislead (or be likely to mislead) the con-

sumer into believing that some substantial change had occurred? * * *

Thus, under the "rule of law" governing agency actions, the Secretary's delegate is faced with an inescapable interrelation between the regulatory and adjudicatory processes under the scheme of the Federal Alcohol Administration Act, in respect of such an application for label approval as appellant Seagram has submitted, when supported by the claim and evidentiary materials appellant Seagram has attempted to advance before the Courts.

Such necessary interrelation between the legislative rule-making and adjudicatory processes of Federal regulatory agencies was very recently well discussed by William L. Cary, former Chairman of the Securities and Exchange Commission, writing in defense of the combined regulatory and adjudicatory functions of that Commission. In his article appearing in the January, 1965 issue of the American Bar Association Journal (Vol. 51, No. 1, p. 33, at 34), entitled: *Why I Oppose the Divorce of the Judicial Function From Federal Regulatory Agencies*, he states:

* * *

I fully agree * * * [that] * * * the development of regulatory standards is the primary responsibility of the administrative agencies. * * *

* * *

The questions we are concerned with * * * involve the means by which the regulatory agency should carry out its job. Rule making and adjudication are two of the regulatory methods used by the agencies. Generally speaking, when its action affects the interest of a group, the agency takes the legislative route: rule making; when it affects the interests of identifiable individuals or business entities, the quasi-judicial route: adjudication. At least as to the SEC, each approach is a necessary element of the regulatory process; to divorce them would make regulation incomplete and ineffective.

* * *

* * * [I]n my opinion, the interaction of informal administrative decisions, formal cases and rule making is both fruitful and necessary. * * * *New problems arise that cannot be foreseen when rules are developed. As conditions change, they may require changes in policy* * * * [Emphasis supplied.]

This Court in *Logansport Broadcasting Corp v. United States*, 93 U.S. App. D.C. 342, 345, 210 F. 2d 24, 27 (1954), expressed itself generally to like effect:

* * * [Even where the statute requires that an adjudicatory hearing be held on a license application, the agency may act] * * * either by passing on specific applications or by way of rule making. Situations are not infrequent in which an administrative agency can properly proceed either through rule making or adjudication: in such a case, the choice "is one that lies primarily in the informed discretion of the administrative agency." *Securities and Exchange Commission v. Chenery Corporation*, 1947, 332 U.S. 194, 203 * * *.

Petitioner also attacks the instant proceeding on the somewhat inconsistent ground that it was essentially adjudicatory and that, as a result, formal findings and conclusion were necessary. The * * * [regulation] * * *, however, allocated television channels to communities throughout the entire country. *On the basis of that general plan [of regulation] individual applications were to be adjudicated. To be sure the overall plan would vitally affect later individual adjudications. But rule making is not transformed into adjudication merely because the rule adopted may be determinative of specific situations arising in the future.* * * * [Emphasis and bracketed material supplied.]

This brings into proper focus the concern the Court manifested in its *per curiam* opinion (fn. 11) as to the possible invalidity of the regulation challenged here. The leading Supreme Court cases which deal with this problem, *Federal Power Commission v. Texaco, Inc.*, 377 U.S. 38 (1964) and *United*

States v. Storer Broadcasting Co., 351 U.S. 192 (1956), bear close analysis in that connection.

In *Texaco*, the issue pertinent here involved the authority of the Federal Power Commission to regulate independent producers of natural gas by means of legislative rule-making so as to entirely foreclose the holding of any adjudicatory hearing on license applications (certificates of convenience and necessity)—*in the teeth of a statutory mandate that such an adjudicatory hearing must be held before such an application for license was denied.*

After holding a series of legislative rule-making proceedings validly held pursuant to statute,⁹ at which all interested parties had an opportunity to present their views, the Commission issued regulations providing that only certain pricing provisions in the contracts of independent natural gas producers were permissible, and that all others were to be deemed "inoperative and of no effect at law." The regulations further provided that a producer's application for a certificate of public convenience and necessity "shall be rejected" if any contract submitted in support of the application contained any forbidden pricing provisions, and that a producer contract thereafter executed would "be given no consideration in determining adequacy" of a pipeline company's gas supply.

Texaco (and another producer) thereafter submitted applications for certificates of convenience and necessity. The Act provided (with immaterial exceptions) that the Commission "shall" hold an adjudicatory "hearing" on such applications. But, because the applications disclosed price clauses that were not "permissible" under the outstanding regulations, the Commission rejected the applications *without hearing*. Texaco (and the other producer) challenged the Commission's action as being in violation of their statutory rights.

⁹ As in the present case, the statutes both in *Texaco* and in *Storer* did not require that the regulation be made "on the record," and APA Sections 7 and 8, 5 U.S.C. 1006 and 1007, also did not apply there. (In this connection, see observations by the Court in its slip op. in the present case, p. 5, fn. 9, and corresponding text.) Thus, the present case constitutes an *a fortiori* situation, in comparison with both *Texaco* and *Storer*. The legislative regulations there expressing agency policy were *not* issued under statutory mandate. Here, the legislative regulations were issued pursuant to statutory mandate.

The Court of Appeals for the Tenth Circuit held that "while the regulations are valid as a statement of Commission policy, they cannot be used to deprive an applicant of the statutory hearing granted those who seek certificates of public convenience and necessity." 377 U.S. at 37. This decision was reversed by the Supreme Court. In its opinion, the Supreme Court stated (*id.* at 39-40):

* * * We think the Court of Appeals * * * erred[,] that the present case is governed by the principle of *United States v. Storer Broadcasting Co.*, 351 U.S. 192, and that the statutory requirement for * * * [adjudicatory] hearing under § 7 [of the Natural Gas Act] *does not preclude the Commission from particularizing statutory standards through the rule-making process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived.* [Emphasis and bracketed material supplied.]

In *Storer*, also, the statute required that an adjudicatory hearing be held on a license application (permit to operate a television broadcast station) before it was denied. The Federal Communications Commission held legislative rule-making proceedings,¹⁰ in which interested parties were permitted to participate. As a result of such proceedings, the Commission issued a regulation limiting to five the total number of television broadcast stations permitted to be operated under single ownership or control. *Storer* claimed this regulatory action deprived it of its statutory right to an adjudicatory hearing on its application for a license to operate a sixth television broadcast station. The Supreme Court, in rejecting this claim, stated (351 U.S. at 205):

* * * We read the Act and Regulations as providing a full [adjudicatory] hearing for applicants who have reached the existing limit of stations, upon their presentation of applications * * * that set out adequate reasons why the Rules *should be waived or amended.* The Act, considered as a whole, requires no more.

¹⁰ See preceding fn. 9.

We agree with the contention of the Commission that a full [adjudicatory] hearing, such as is required by * * * [the statute,] * * * would not be necessary on all such applications. As the Commission has promulgated its Rules after extensive administrative hearings, *it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the Rules.* We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. * * * [Emphasis and bracketed material supplied.]

Both *Texaco* and *Storer* must be understood as having involved these important differences from the present case: *First*, the statutes there involved required that an adjudicatory hearing be held on the license application. But here neither the statute nor the Constitution²² requires that an adjudicatory hearing be held on the application for label approval. *Second*, the statutes there involved did not prescribe that the administrators hold public rule-making proceedings, and then incorporate their legislative policy determinations in the regulations. Here the statute does prescribe such regulatory action, and contemplates that the interested parties shall have had only the statutory opportunity to participate in the rule-making process, but no statutory right to be "heard" thereafter.

In view of these essential differences in the statutes, we submit, *Texaco* and *Storer* are not to be taken as laying down any rule governing here that a provision for waiver *must* be included in regulations to give them sufficient flexibility. Under the circumstances here, we believe, the available remedy to petition for amendment suffices to bar a claim of arbitrariness, and to sustain the validity of the Labeling Regulations. In *Acme Fast Freight, Inc. v. United States*, 154 F. Supp. 239, 241 (S.D.N.Y. 1957) (Three-Judge Court), the Court considered that the rule-making process for amendment there supplied sufficient flexibility to give validity to binding regulations. It thoughtfully stated:

²² See the discussion under Point II *infra*.

* * * Once * * * [the Interstate Commerce Commission's] regulation was promulgated, it had no authority to authorize a variance, except by *an amendment to the regulation*, at least unless the regulation itself provided for the granting of such variances. [The regulation there contained no such provision.] * * * The justness or reasonableness * * * [of making a variance in plaintiff Acme's case] * * * was not properly before the Commission in this [adjudicatory] proceeding.

The question of justness or reasonableness should have been presented by an appropriate application in proceeding MC-37 [the rule-making proceeding]. *This is no mere procedural nicety.* The issue raised by the plaintiff cannot be determined by the impact of the regulation upon it alone. In an appropriate [rule-making] proceeding there would be two questions. *First and foremost, should any exception be made to the uniform Commission regulation* and second, should an exception be made in favor of the plaintiff. The first question is the primary question and that may only be determined upon the consideration of nation-wide factors. The wisdom of uniform regulations, like the wisdom of legislation, can rarely be determined by examining their impact upon a single individual. *MC-37 [the rule-making proceeding] offers the proper vehicle because in that proceeding the parties offer full representation of the industry*, whereas in the present proceeding a much narrower segment of the industry was represented. * * * [Emphasis and bracketed material supplied.]

The discussion in *Storer, supra*, 351 U.S. at 204-205, is pertinent in this connection. "If time and changing circumstances" here reveal that the "public interest" is no longer served by the outstanding Labeling Regulations, it must be assumed that the administrators will perform their "statutory obligation" and change the regulations. And if in a proper case the administrators' denial of any such petition for amendment of the regulations can be shown to be arbitrary and capricious *under all the applicable circumstances*, the way would

be open to an aggrieved party to secure appropriate relief in the Courts.¹²

Both *Texaco* and *Storer* teach not only that legislative rule-making can control adjudicatory action without hearing. They also make it clear that an agency is not compelled to entertain an application for waiver (where the regulations permit waiver) in adjudicatory proceedings required by statute, or a petition for amendment of the regulations (where the regulations do not permit waiver)—if, on the face of the application or petition seeking relief from the regulations, no good cause is shown for the agency to consider making any departure from the controlling regulations.

In this connection, the decisions of this Court in *Gerico Investment Co. v. Federal Communications Commission*, 99 U.S. App. D.C. 379, 240 F. 2d 410 (1957) and *Coastal Bend Television Co. v. Federal Communications Commission*, 98 U.S. App. D.C. 251, 234 F. 2d 686 (1956), are instructive. Those decisions followed in the wake of the *Logansport Broadcasting* case, *supra*, in which the Federal Communications Commission's regulations were sustained against attack.

In *Coastal Bend*, the Federal Communications Commission denied adjudicatory applications on the basis of its outstanding legislative regulations. The petitioners appealed to this Court, seeking essentially a judicial determination that, since the expectations of the Commission underlying the regulations had not been fulfilled, the regulations no longer served the public interest; and that, hence, the Commission's adjudicatory actions based on the regulations should be overturned. This Court declined to intervene, holding in substance that, since Congress had committed the matter to the discretion of an ex-

¹² In respect of the Court's observations in its slip op., p. 5, fn. 10, and corresponding text, we note that if judicial review of the regulatory action taken here could not be directly obtained under the principles enunciated in such cases as *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), it would be available at the time the application for label approval is denied on the ground that the outstanding Labeling Regulations bar approval. And see *Functional Music, Inc. v. Federal Communications Commission*, 107 U.S. App. D.C. 34, 37-38, 274 F. 2d 543, 546-547, cert. denied 361 U.S. 813 (1959).

pert administrative agency, not the courts, it was up to the agency, not the courts, "to pass on the wisdom" of having the regulation remain in effect and govern the adjudicatory applications. 98 U.S. App. D.C. at 255, 234 F. 2d at 690.

In *Gerico*, the Federal Communications Commission also took adjudicatory action on the basis of the outstanding legislative regulations. It granted a construction permit for a television broadcasting station to an intervenor applicant. *Gerico Investment Company* appealed, as an "aggrieved" party, to this Court. *Gerico* contended (*inter alia*) that in its petition for "deintermixture" of VHF and UHF channels it had submitted different evidence than that previously considered in the *Coastal Bend* case. This Court, in rejecting that claim, declared (99 U.S. App. D.C. at 382, 240 F. 2d at 413):

* * * But this data was presented to the Commission in the rule-making proceedings and can therefore provide no basis for distinguishing this case from *Coastal Bend*, where we said:

"We do not think the Commission abused its discretion in denying intervention when the only purpose was to argue the very points that had been argued * * * in the rule-making proceeding * * *."

We think the foregoing discussion should make it clear that the Labeling Regulations validly control the adjudicatory action of the Secretary of the Treasury on applications for label approval, and that adequate means are available for effecting proper amendments to the Labeling Regulations when and as circumstances require. Hence, unless and until the Labeling Regulations are amended, the "rule of law" governing the Secretary's actions precludes him from granting appellant *Seagram*'s application for label approval, no matter what evidentiary materials *Seagram* may present.

As developed under Point II *infra*, the "rule of law" governing the Court's judicial review powers limits the Court to determining strictly as a matter of law that the Secretary's action in this matter does not exceed the bounds of his lawful authority. We now turn to discuss that fundamental point of proper agency-court relations.

II. Where a statute validly confers authority on an administrator to make a determination in the exercise of his judgment and discretion, and neither the Constitution nor the statute requires any *de novo* judicial trial of the facts, the conduct of a *de novo* trial of facts by the Court would constitute an improper invasion of the administrative sphere of competence.

The fundamental separation-of-powers principle for which we contend here far transcends this particular case in importance. It goes to the very heart of proper agency-court relations. Where Congress has by valid statute assigned an agency the function of exercising its judgment and discretion in respect of a matter, and neither the Constitution nor the statute assigns any larger role to the Courts, the judicial function—where the matter is subject to judicial review at all—is to determine as a matter of law solely that the agency's action is within the scope of its statutory authority.

The basic reason for this is simply that the law has in the particular instance reposed upon the agency—not in the Courts—the power to act in the exercise of its administrative judgment and discretion. In such an instance, the Courts have jurisdiction, in ascertaining the legal rights of a party in a suit properly before them, to pass on the legality of the action of the agency; but the judicial function ends there.

We begin with the "cardinal principle" stated in *United States v. Morgan*, 307 U.S. 183, 190-191 (1939):

* * * [I]n construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities * * * in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end * * *. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice * * *.

While the following statement of what he deemed to be "controlling considerations" was made by Mr. Justice Frankfurter in a dissenting opinion in *Ashbacker Radio Co. v. Fed-*

eral Communications Commission, 326 U.S. 327, 334, 334-335 (1945), it speaks out of his long study in the administrative law field, and we believe it warrants serious thought by all concerned with effectuating proper agency-court relations:¹²

The extent to which administrative agencies are to be entrusted with the enforcement of federal legislation is for Congress to determine [subject to constitutional limitations]. Insofar as the actions of these agencies come under the scrutiny of judicial review, it is the business of the courts to respect the distribution of authority that Congress makes as between administrative and judicial tribunals. Of course courts must hold the administrative agencies within the confines of their Congressional authority. *But in doing so they should not even unwittingly assume that the familiar is the necessary and demand of the administrative process observance of conventional judicial procedures when Congress has made no such exaction.* Since these agencies deal largely with the vindication of public interest and not the enforcement of private rights, this [Supreme] Court ought not to imply hampering restrictions, not imposed by Congress, upon the effectiveness of the administrative process. One reason for the expansion of administrative agencies has been *the recognition that procedures appropriate for the adjudication of private rights in the courts may be inappropriate for the kinds of determinations which administrative agencies are called upon to make.* [Emphasis and bracketed material supplied.]

¹² We do not mean to be taken as failing to recognize the essential role of the judiciary in respect of the administrative process. "In this country, where even legislative action is subject to some judicial veto, there has been little question as to the propriety of judicial review of administrative adjudication. The controversies that have arisen relate rather to the details of the adjustments between courts and administrative agencies * * *." Final Report of Attorney General's Committee, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941), p. 75. See Professor Jaffe's article, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 406-407 (1958). He points out the "deep wisdom" of the division of functions between agencies and the Courts. But, he adds, this is good where the judiciary "limits itself to the question of illegality or arbitrariness"; it is bad where "the judiciary forgets its role and tries to run the show."

In *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20-21 (1952), the Supreme Court struck down action by the Court of Appeals improperly invading the administrative sphere, stating:

* * * When the court decided that the license should issue without the conditions [prescribed by the agency], it usurped an administrative function. * * * [T]he guiding principle, *violated here*, is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration * * *.

The Court, it is true, has power "to affirm, modify,"¹⁴ or set aside" the order of the Commission "in whole or in part." * * * But that authority is not power to exercise an essentially administrative function * * *. [Emphasis, bracketed material and footnote reference supplied.]

Again, in *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141-144 (1940), the Supreme Court spoke out as follows:

A much deeper issue, however, is here involved * * *. What is in issue is * * * due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce [conferred on the Commission] and the reviewing power which it has conferred on the courts under Article III of the Constitution. * * * [T]o the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. The technical rules * * * [governing the regular business of the courts] * * * are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a dele-

¹⁴ In the present case, the Federal Alcohol Administration Act does not confer any power on the Court to "modify" the Secretary's action on an application for label approval. Hence, the Supreme Court's remarks in the *Idaho Power* case, *supra*, apply here with even more force.

gated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under the Constitution. [Bracketed material supplied.]

And see *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 55 (1948).

The fact that the Act here gives the District Court "jurisdiction of suits to enjoin, annul, or suspend in whole or in part any final action by the Administrator upon any application" for label approval does not affect the applicability here of the separation-of-powers principle involved. Long before a suit for injunction was written into the Federal Alcohol Administration Act in 1935, as the mode of judicial review of actions by the Secretary's delegate on applications for label approval, it had come to be well established that a plenary suit in equity for an injunction against allegedly unlawful agency action, along with mandamus, habeas corpus, etc., was an appropriate mode of securing limited judicial review of administrative agency action, to keep administrative agencies within the confines of the statutory authority conferred on them by Congress.

The historical background establishes beyond cavil that when Congress wrote this judicial review provision into the Act it meant to expressly confer on the Court that limited power of judicial review which the "rule of law" requires.

Ever since Chief Judge Marshall's famous *dictum* in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 168-173 (1803), cleared the path for the use of mandamus as a general, non-statutory mode of obtaining limited judicial review in the Courts of agency action, it has been well settled that the separation-of-powers doctrine under discussion here precludes judicial invasion of the sphere validly committed by statute to administrative competence. See *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 609, 613, 617 (1838); *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515 (1840); *United States ex rel. Dunlap v. Black*, 128 U.S. 40, 44-48 (1888).

In *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1875), the Supreme Court held that a suit for an injunction is also available as a non-statutory form of conducting limited judicial review, equally with mandamus, *and to the same end*: When a plain official duty, requiring no exercise of discretion,

is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of *mandamus* and *injunction* are somewhat correlative to each other. * * * (The case, however, involved State, not Federal, officers.)

Thereafter, in *Noble v. Union River Logging RR. Co.*, 147 U.S. 165, 171-172 (1893), these same principles of limited judicial review were applied against a Federal officer. All the leading cases, going back to *Marbury v. Madison*, *supra*, were reviewed. And the Supreme Court there made these significant observations:

We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the Head of a Department, *under any view of the facts that were laid before him, was ultra vires, and beyond the scope of his authority.* If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. * * *
[Emphasis supplied.]

In the immigration field, habeas corpus was early pressed into service as a non-statutory form of judicial review. In *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892), habeas corpus was sued out by an alien challenging the constitutionality of the immigration statute. The Supreme Court, in holding that the statute could constitutionally confer on the immigration authorities authority to make final determinations of fact, stated:

* * * [T]he final determination of * * * facts [on which the right of a person to enter the United States depends] may be [constitutionally] entrusted by Congress to executive officers; and in such a case, *as in all others*, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge

of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted. *Martin v. Mott*, 12 Wheat, 19, 31, *Philadelphia & Trenton Railroad v. Stimpson*, 14 Pet. 448, 458; *Benson v. McMahon*, 127 U.S. 457; *In re Oteiza*, 136 U.S. 330. [Emphasis and bracketed material supplied.]

These earlier decisions place *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902),¹⁵ in proper perspective. That case came up on a demurrer to the complaint; hence, all material facts averred therein were deemed admitted. The Court conceded *arguendo* that if the decision of the Postmaster General that a violation of law had occurred was "based upon some evidence to that effect," it would be final and conclusive and not the subject of review by any court. But, since the demurrer conceded the truth of the allegations in the complaint, and those allegations were to the effect that no statutory violation had occurred, a case was made out as a matter of law of administrative action in excess of statutory authority. Importantly for purposes of the present discussion, the Supreme Court stated (187 U.S. at 109-110):

* * * [I]f the evidence before the Postmaster General, in any view of the facts, failed to show a violation

¹⁵ The Court in its *per curiam* opinion (p. 5, fn. 8) cited *Jordan v. United Insurance Company of America*, 110 U.S. App. D.C. 112, 289 F. 2d 778 (1961), as one of the two cases on which it relied for its assertion of judicial power to conduct a *de novo* judicial trial of the facts here. That case (in turn) relied heavily upon *American School of Magnetic Healing, supra*. 110 U.S. App. D.C. at 117, 289 F. 2d at 783. As developed above, *American School of Magnetic Healing* turned on an issue of law, not fact. *Jordan* also relied heavily upon *Ng Fung Ho v. White*, 259 U.S. 276 (1921). That reliance was misplaced. *Ng Fung Ho* involved a claim by a resident to United States citizenship. The Supreme Court there held that in such a case the *Constitution* requires a judicial trial *de novo*. The general rule in the immigration field, however, has been authoritatively settled by *Kessler v. Strecker*, 307 U.S. 22, 34 (1939). There, the Supreme Court held: "A district court cannot upon *habeas corpus*, proceed *de novo*, for the function of investigation and finding has not been conferred upon it but upon the Secretary of Labor." Thus, neither *American School of Magnetic Healing* nor *Ng Fung Ho* serves to support the assertion of judicial power to conduct a *de novo* trial of the facts here.

of any Federal law, the determination of that official that such violation existed *would not be the determination of a question of fact, but a pure mistake of law on his part, because the facts being conceded, whether they amounted to a violation of the statutes, would be a legal question and not a questions of fact.* * * *

The facts, which are here admitted of record [by the demurrer], show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and *his determination that those admitted facts do authorize his action is a clear mistake of law as applied to those admitted facts, and the courts, therefore, * * * have power in a proper proceeding to grant relief.* [Emphasis and bracketed material supplied.]

In *United States ex rel. Riverside Oil Company v. Hitchcock*, 190 U.S. 316, 324-325 (1903), the Supreme Court declined to interfere with the decision of the Secretary of the Interior, made on the record before him, as to the legal meaning of a statutory term as applied to the facts in the case. The Court felt that this essentially involved the exercise of judgment and discretion on the Secretary's part and held it to be judicially non-reviewable.¹⁶ The Court determined that *American School of Mag-*

¹⁶ As the famous concurring opinion of Mr. Justice Brandeis in *St. Joseph Stockyards Co. v. United States*, 292 U.S. 38, 84 (1936) indicates, the modern law of limited judicial review has moved away from the notion that an administrative determination of the legal meaning of a statutory term as applied to facts is such an exercise of administrative judgment and discretion as to be wholly judicially nonreviewable. See *Gegiow v. Uhl*, 239 U.S. 3, 9-10 (1915).

Currently, the guiding principle seems to be that, where construction of a statutory term as applied to facts requires application of the agency's expertise, the agency's interpretation will not be disturbed on judicial review if it has a "basis in law" and "warrant in the record". Compare *O'Leary v. Brown-Pacific-Mason, Inc.*, 340 U.S. 504, 508 (1951); *Unemployment Compensation Comm., etc. v. Aragon*, 320 U.S. 143 153-154 (1946); *National Labor Relations Board v. Hearst Publications*, 332 U.S. 111, 131 (1944) with *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946). But, except for this, we think the Court's statements in *Riverside Oil*, *supra*, are still valid law today.

netic Healing, supra, decided nothing contrary to the following stated views of the Court:

That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessary jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination *by mandamus or injunction*. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction * * * Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. * * * The responsibility as well as the power rests with the Secretary, uncontrolled by the courts. [Emphasis supplied.]

In *Bates & Guild Co. v. Payne*, 194 U.S. 106, 109-110 (1904), the Supreme Court summarized its understanding of the then-existing state of the law of judicial review as follows: "* * * [W]here the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and * * * even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing." And see *Leach v. Carlisle*, 258 U.S. 138, 139-140 (1922).

Professor Jaffe in his article *The Right to Judicial Review I*, 71 Harv. L. Rev. 401 (1958), traces the power of the common-law courts to conduct limited judicial review of the legality of official governmental action back to a decision by Lord Holt in 1700, or even earlier. And he notes that: In *Degge v. Hitch-*

cock, 229 U.S. 162 (1913), the Supreme Court [he thinks, incorrectly] took certiorari entirely out of the Federal common-law system as a mode of obtaining limited judicial review of administrative action. Since then "its place has been taken to some extent by injunction, declaratory judgment, and since 1946, by a proceeding to review under section 10 of the Administrative Procedure Act," 5 U.S.C. 1009. Habeas corpus remains an available common-law remedy: in *Gegion v. Uhl*, *supra*, 239 U.S. 3 (1915), judicial intervention was allowed by that means to keep the Administrator within the bounds of his statutory authority as to a matter of law. *Id.* at 403-425.

In *Degge v. Hitchcock*, *supra*, 229 U.S. at 171-172, the Supreme Court cited *American School of Magnetic Healing* as having established that equity relief is available as a general, non-statutory form of judicial review to determine the validity of agency action. The availability of that mode of review was held to foreclose resort to certiorari. Following that decision, injunction became the principal nonstatutory means of obtaining judicial review in the Federal courts.

The *National Broadcasting* case, *supra*, too was in the nature of "a plenary suit in equity."¹⁷ *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 417, 415 (1942). And the bill of complaint stated "a cause of action in equity." *National Broadcasting Co. v. United States*, 316 U.S. 447, 449 (1942) (the same case at an earlier stage of the litigation). Yet, this did not affect Judge Learned Hand's conclusion, affirmed by the Supreme Court, that the Court had no power to decide for itself issues of fact statutorily committed to the agency's judgment and discretion—not to the Courts.

¹⁷ Section 402(a) of the Communications Act of 1934, 48 Stat. 1093, originally adopted the judicial review provisions in the Act of October 22, 1913, 38 Stat. 219, for review of Federal Communication Commission orders not subject to direct review in the Courts of Appeals. The Act of October 22, 1913, provided that no interlocutory injunction would be issued to suspend or restrain the enforcement of an order unless it was heard by a Three-Judge District Court. This was patterned after the procedure finally established for Interstate Commerce Commission cases, also a "plenary suit in equity," under which the Supreme Court, led by Chief Justice White, worked out the principles of limited review governing judicial review of ICC orders.

Apart from the *Ng Fung Ho* doctrine¹³ that on a claim to United States citizenship the Constitution requires that a resident be accorded the greater protection of a *de novo* judicial trial of the facts, there are only two historical exceptions to the basic principle under discussion here, that the separation-of-powers doctrine precludes any *de novo* judicial trial of the facts where the statute confers judgment and discretion upon an agency to act upon its own findings as to the facts. Neither of those exceptions applies here. Both appear to be obsolete doctrine.

(1) "Confiscation" doctrine. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1920), held that on a claim of confiscation in rate-making due process of law requires that the "confiscation" issue be subject to a *de novo* judicial review on the administrative record (not a *de novo* judicial trial of the facts), so that the Court can make "its own independent judgment as to both law and facts." This holding was reiterated in *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38, 52-53 (1936). But that decision was accompanied by Judge Brandeis' famous concurring opinion, in which he powerfully marshalled the arguments why the Constitution should not be construed so as to permit any such *de novo* judicial review of the facts on the administrative record in respect of a "confiscation" issue. He distinguished the constitutional right of a United States resident to "liberty of person", as exemplified by *Ng Fung Ho*, *supra*, from "other constitutional rights." In respect of constitutional claims involving property, he pointed out, "a multitude of decisions" show "that due process of law does not always entitle an owner to have the correctness of findings of fact [made in relation to his property independently] reviewed by a court. * * *" 298 U.S. at 73, 77.

This doctrine that "confiscation" claims constitutionally require judicial review *de novo* of the law and facts on the administrative record has since been generally repudiated, in line with Mr. Justice Brandeis' *St. Joseph* concurring opinion. The established "substantial evidence" rule governing judicial review of agency action fully satisfies the requirements of consti-

¹³ See fn. 15 *supra*.

tutional due process of law. *Alabama Power Serv. Commission v. Southern Ry. Co.*, 341 U.S. 341, 348 (1951); *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575-595 (1942). Cf. *Railroad Commission v. Rowan & Nichols Co.*, 311 U.S. 570, 575-576 (1941). In *American Trucking Assns., Inc. v. United States*, 344 U.S. 298, 320 (1953), the Supreme Court construed *St. Joseph* (and other leading authorities) as meaning only that the right to introduce evidence in support of a "confiscation" claim in a *de novo* judicial trial will lie only "if the * * * [agency] * * * bars an opportunity to do so [administratively]." ¹⁰

(2) "Jurisdictional Fact" doctrine. *Crowell v. Benson*, 285 U.S. 22, 46 (1932), held that in respect of facts going to determine the agency's very jurisdiction over the subject matter involved, constitutional due process of law requires that the reviewing court make "its own examination and determination" of such facts. The decision in that case was accompanied by a masterful dissent of Mr. Justice Brandeis (joined by Stone and Roberts, JJ.). He contended that "jurisdictional" facts should be deemed to be like any other facts in the case, and that if the administrative findings as to those facts are found on judicial review to be "supported by evidence," they "must be accepted as conclusive" unless "there was some [vitiating] irregularity in the [administrative] proceeding * * *." 285 U.S. at 65-95. ²⁰

It has been remarked that this doctrine, though never expressly overruled, must be deemed to have been laid to "a deserved repose" by reason of the criticisms it brought forth and "the attritions of that case through later decisions." *Estep v. United States*, 327 U.S. 114, 134, 142 (1946) (concurring opinion of Mr. Justice Frankfurter). See *City of Yonkers v. United States*, 320 U.S. 685, 692, 695 (1944) (dissenting opinion of Mr. Justice Frankfurter). ²¹

Despite the differences of view expressed in *Crowell v. Benson* between the majority opinion written by Chief Justice Hughes, and the dissenting opinion written by Mr. Justice

²⁰ See Davis, *Administrative Law Treatise* (1968), Vol. 4, § 29.09, pp. 171-172, including fn. 30.

²¹ In particular, see Mr. Justice Brandeis' penetrating discussion at 285 U.S. 74-80.

²² Also see Davis, *Administrative Law Treatise*, Vol. 4, § 29.18, p. 157, fn. 20.

Brandeis, on the validity of carving out a "jurisdictional fact" exception, both were in full agreement on the main principle that we assert here. Compare Mr. Justice Hughes' discussion at 285 U.S. 46-54 with Mr. Justice Brandeis' discussion at 285 U.S. 74-76. The only distinction between the present case, and the point there made by both Chief Justice Hughes and Mr. Justice Brandeis, is that here we are concerned with what is regarded as essentially an "executive" or "purely administrative" function (initial licensing), whereas in the authorities cited by Chief Justice Hughes and Mr. Justice Brandeis, the matters involved were quite clearly in the category of "quasi-judicial" decisions. That distinction, however, makes no difference in the application of the controlling separation-of-powers principle. Again, we have an *a fortiori* situation here. Moreover, as we shall develop, where such "executive" action is judicially cognizable, proper limited judicial review may be had thereof, even though such "executive" action is not required, either constitutionally or by statute, to be made on the basis of any "hearing" conducted "on the record."

Thus, if we were to substitute the word "executive" for "quasi-judicial," and the word "agencies" for "tribunals," the following statement by Mr. Justice Brandeis, 285 U.S. 75-76, would properly apply here:

In the review of the *quasi-judicial* decisions of these federal administrative tribunals the bill in equity serves the purpose which at common law, and under the practice of many of the States, is performed by writs of certiorari. It presents to the reviewing court the record of the proceedings before the administrative tribunal in order that determination may be made * * * whether the authority conferred has been properly exercised. Neither upon bill in equity in the federal courts nor writ of certiorari in the States is it the practice to permit fresh evidence to be offered in the reviewing court.

* * * [Emphasis in original.]

And the following statement by Chief Justice Hughes, 285 U.S. at 54, would also fully apply here:

* * * [W]e are unable to find any constitutional obstacle to the action of the Congress in availing itself of

a method shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law.

As Chief Justice Hughes pointed out, 285 U.S. at 50-51, *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 280-285 (1855), established that it is constitutionally permissible for Congress to commit to final agency decision without judicial intervention fact determinations in respect of "various matters, arising between the government and others which from their nature do not require judicial determination and yet are susceptible of it." Further:

* * * "[T]he mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." *Ex parte Bakelite Corp.*, 279 U.S. 438, 451. Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payment to veterans.

Mr. Justice Brandeis added (285 U.S. at 88-90): "Administrative bodies in the cases referred to by the Court * * * are tribunals of final resort within the scope of their authority. * * * With respect to them, the function of the court is not one of review but essentially one of control—the function of keeping them within their statutory authority."

It is also important in this connection to note that the constitutional Courts may not undertake any "purely administrative" tasks—including that of being "a superior and revising agency" in respect of the exercise of administrative judgment and discretion—even if assigned them by Congress. *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464, 467-469 (1930); *Postum Cereal Co. v. California Fig Nut Co.*, 272

U.S. 693, 700-701 (1927); *Keller v. Potomac Electric Co.*, 261 U.S. 428, 442 (1923).

Thus, we submit, the entire current law as to limited judicial review of agency action militates against the aberrant view expressed in the *per curiam* opinion that a *de novo* judicial trial of the facts may properly lie in the circumstances of this case. This brings us to consideration of what, precisely, is "at stake" in this litigation.

As already noted (fn. 2, *supra*), we think the opinion of this Court in the first *Continental Distilling Corp.* case is correct in its view that what is involved in this lawsuit is not at all a "licensing" matter, as that term is generally understood. The denial of a labeling application has no basic effect upon the right of appellant Seagram to continue carrying on its business as a distiller. And it is on analysis only regulation of an incident of such business, in the interest of preventing consumer deception.

But if we nevertheless proceed here *arguendo* on the assumption that the *per curiam* opinion is correct in classifying this matter as involving a "licensing" procedure, at most what is involved is an application for an "initial license." Appellant Seagram was never previously authorized to make any such statement on its blended whiskey label as it now seeks to make. And, as indicated, this application for "initial license" has no basic effect upon the right of appellant Seagram to continue carrying on its distilling business.

Due process of law "does not require a trial-type hearing in every conceivable case of government impairment of private interest." It is "not a technical conception with a fixed content unrelated to time, place and circumstances." And, "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action." *Cafeteria, etc., Workers Union, etc. v. McElroy*, 367 U.S. 886, 894-895 (1961).

The governmental function here involved is regulation of the Distilled Spirits industry in the interest of preventing consumer deception. The private interest here affected is not the basic

right to follow a chosen trade, profession, or other lawful means of earning a livelihood. Thus, this case is clearly distinguishable from all cases involving applications for "initial licenses" to practice a profession, enter a regulated business, etc. And it most definitely is distinguishable from cases involving renewal or substantial modification of a prior granted license, where the licensee has invested in business in reliance upon such prior granted license.²²

Moreover, in respect of "licenses" generally, it seems clear that they are in the nature of a special privilege, that they do not constitute "property" in any constitutional sense, and that they are granted and are to be exercised subject to existing regulatory restrictions and such other regulatory restrictions as may thereafter be reasonably imposed. See 33 Am. Jur. *Licenses* §§ 2, 21. It has been held (in various "initial licensing" situations) that due process of law does not require that any "hearing" in the formal sense²³ be accorded the applicant—in the absence of any provision in the governing statute expressly

²² In the situation where a licensee has made a substantial investment in a business in reliance upon a prior granted license, cognizable injuries may be involved in connection with renewal or substantial modification of such prior granted license. See *L. B. Wilson, Inc. v. Federal Communications Commission*, 83 U.S. App. D.C. 176, 185, 170 F. 2d 793, 802 (1948). Since that is not the situation here, all such cases are clearly distinguishable from the case at bar. Appellant Seagram here invested in the storage of its neutral spirits in the teeth of the outstanding Labeling Regulations which bar the making of any such "age" statement on a label upon the basis of such storage, as Seagram seeks to make here.

²³ We mean here an adjudicatory proceeding conducted "on the record" (with or without such other panoplies of a full quasi-judicial hearing as the right to make a personal appearance, and to confront and cross-examine adverse witnesses). And we mean to distinguish from such a "formal hearing" the conduct of an informal preceeding by an agency, wherein an informal "record" is created, e.g., where an applicant for an "initial license" submits written representations and documentary evidentiary materials in support of his application for agency consideration (in accordance with the requirements of the exhaustion doctrine), and the agency then fairly considers such matters in arriving at its decision. Where such agency action is subject to judicial review, such an informal "record" must sufficiently reflect the basis for the agency's decision. Else, the Court is not able properly to determine that the agency's action was or was not arbitrary or capricious, or otherwise in excess of the agency's statutory powers. See discussion *infra* of *Lloyd Sabando Societa Anonima, etc. v. Biting*, 287 U.S. 829 (1932), a leading case on this point.

or impliedly requiring that such a "hearing" be given the applicant. *Incorporated Village of Lynbrook v. Simon*, 236 N.Y.S. 2d 823, 824-825 (N.Y. Sup. Ct. 1962); *Fink v. Cole*, 150 N.Y.S. 2d 175, 177-180 (N.Y. Ct. of App. 1956); *Thayer Amusement Corp. v. Moulton*, 7 A. 2d 682, 684-690, 124 A.L.R. 236 (Sup. Ct. R.I. 1939). See 33 Am. Jur. *Licenses*, § 60, at p. 379.

In *Communications Commission v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953), the Supreme Court indicated that Congress could have constitutionally made the Commission's administrative decision in respect of granting or denying "initial licenses" wholly non-reviewable in the Courts, had it chosen to do so. And even more than may possibly be the case in respect of businesses having no potential for injury to the public health, morals, etc., the procurement of an "initial license" in respect of the liquor business may be deemed a "special privilege" subject to plenary regulation. The power of government to "forbid the manufacture and sale of liquor and regulate its traffic is not open to controversy." *Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U.S. 311, 320 (1917). See *Nebbia v. New York*, 291 U.S. 502, 528 (1936) (fn. 26 and corresponding text).

Administrative due process is not necessarily judicial-type process. *Reetz v. Michigan*, 188 U.S. 505, 507 (1903). As Mr. Justice Frankfurter has wisely pointed out, "procedures appropriate for the adjudication of private rights in the courts may be inappropriate for the kinds of determinations which administrative agencies are called upon to make." *Ashbacker Radio Co. v. Federal Communications Commission*, *supra*, 326 U.S. at 335 (dissenting opinion). If we go back to the historic case of *Murray's Lessee v. Hoboken Land and Improvement Co.*, *supra*, we find it stated there that not all "administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law" require the holding of a judicial-type hearing before private rights may be affected by administrative action. 59 U.S. (18 How.) at 280. See *Reetz v. Michigan*, *supra*, 188 U.S. at 507-510.

Even in judicial proceedings due process may require in some circumstances no more than notice and an opportunity to file and obtain consideration by the Court of objections and excep-

tions after the initial decision has been entered. See *Mitchell v. Reichelderfer*, 61 U.S. App. D.C. 50, 52, 57 F. 2d 416, 418 (1932). Some leading instances in which it has been held that administrative due process does not require any formal administrative "hearing" to be conducted "on the record" are: *Cafeteria, etc. Workers Union, etc. v. McElroy*, *supra*, 367 U.S. at 896-899; *Lloyd Sabaudo Societa Anonima, etc. v. Elting*, *supra*, 287 U.S. at 333-334. Cf. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909); *Buttfield v. Stranahan*, 192 U.S. 470, 495-497 (1904). See *Dyer v. Securities and Exchange Commission*, 287 F. 2d 773, 779-780 (8th Cir. 1961); *Eastern Airlines, Inc. v. Civil Aeronautics Board*, 87 U.S. App. D.C. 331, 333-334, 185 F. 2d 426, 428-429 (1950), *judgment vacated and proceedings ordered dismissed as moot*, 341 U.S. 901 (1951).

While under the Administrative Procedure Act the process of licensing is classified as adjudicatory (slip op., p. 3, fn. 3), that classification does not affect the traditional concept that licensing is essentially a "purely administrative" or "executive" function. As we have shown, it is constitutionally permissible for Congress to make no provision for the conduct of any formal "hearing" in connection with the adjudication of an application for an "initial license." And, as the Court has recognized (slip op., pp. 2-3), the Federal Alcohol Administration Act contains no provision requiring the conduct of any type of "hearing" on such an application. Section 4 of the Act, 27 U.S.C. 204, makes express provision for "due notice" and "opportunity for hearing" in connection with an application for "initial license" to engage in the liquor distilling business, and for an appeal from a decision of the agency denying, suspending, revoking, or annulling such an "initial license", directly to the Court of Appeals. Thus, Congress' silence in Section 5 of the Act as to any kind of "hearing" clearly signifies the legislative intent not to impose any statutory "hearing" requirement in respect of the agency's passing upon an application for label approval.

Before we address ourselves to the matter on the Court's premise (which we believe to be erroneous) that what it has before it in this case is solely an adjudicatory denial of an

application for label approval, we wish to note this: The Court has manifested concern that the Federal Alcohol Administration Act does not require that the Labeling Regulations be made "on the record," and that the regulation challenged here "was not derived from findings based on evidence in a record." (Slip op., p. 5.) But, as already observed, *Federal Power Commission v. Texaco, Inc.*, *supra*, and *United States v. Storer Broadcasting Co.*, *supra*, likewise involved regulations not required to be made "on the record," and the policy judgments there made by the agencies were also not required to rest exclusively on "findings based on evidence in a record." Yet, that did not affect the validity of the agencies' action denying without hearing license applications which clearly violated the outstanding regulations.

Likewise, in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), there was no statutory requirement that the regulations be made "on the record," and the policy judgments there made by the Federal Communications Commission were also not required to rest exclusively on "findings based on evidence in a record." Yet, the Supreme Court approved the District Court's action in disposing of the case solely on the basis of the record made in the course of the rulemaking proceedings conducted by the Federal Communications Commission, and in refusing to conduct any *de novo* judicial trial of the facts.

But even if we assume *arguendo*, as the Court supposes, that what it has before it for consideration is the adjudicatory matter of denial of appellant Seagram's application for label approval, and nothing more, there is yet no warrant here for the Court to conduct any *de novo* judicial trial of the facts. Sufficient "opportunity for proof or disproof of the factual allegations" would still lie before the agency to "meet the requirements for a fair and just disposition" of the matter administratively, and to make any *de novo* judicial trial of the facts unwarranted.

Where Congress has conferred statutory authority on an agency to make an adjudicatory determination in the exercise of its judgment and discretion, and neither the Constitution nor the statute requires that the Court conduct a *de novo*

judicial trial of the facts, the proper judicial course is clearly spelled out in the decided cases.

In a case wherein the Court has jurisdiction to conduct limited judicial review to determine that an administrative decision is not arbitrary or capricious, or otherwise in excess of the agency's statutory authority, a sufficient "record" of the agency's proceedings must be provided, so that the Court can properly determine that the agency acted within the bounds of its administrative competence. If in such a case the administrative "record" is insufficient for the purposes of limited judicial review, the case need be remanded to the agency for the conduct of further appropriate administrative proceedings. Moreover, in any adjudicatory matter within the agency's area of competence, the basic "rule of law" controlling administrative action requires that the agency fairly pass upon all material issues raised by the party or parties (whether on the basis of an "evidentiary" record or otherwise). It also requires that the agency give fair consideration to whatever relevant evidentiary materials the party or parties may proffer in support of their applications for agency action. And its final decision must appear to be within the bounds of reason. See *United States v. Compagnie Generale Transatlantique*, 26 F. 2d 195, 197 (2d Cir. 1928).

Thus, not only where the evidentiary or non-evidentiary record on which the agency rested its final adjudicatory action proves insufficient for purposes of proper judicial review, but also where such record discloses that the agency committed procedural error by failing to give due consideration to the party's representations or evidentiary materials, or where the agency failed to validly exercise the judgment and discretion conferred upon it by the statute, the case need be remanded by the Court to the agency for further appropriate administrative proceedings. And none of these circumstances calls for the Court to invade the administrative sphere by conducting a judicial trial *de novo*, where not authorized to do so by the Constitution or the statute. Cf. *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943). Compare *Tod v. Waldman*, 266 U.S. 113, 119-121 (1924) with

Chin Yow v. United States, 208 U.S. 13 (1908), in light of *Kessler v. Strecker*, *supra*, 307 U.S. at 34-35.

Furthermore, it has been authoritatively established that an "evidentiary" record can be validly created administratively without any trial-type "hearing" whatever. *Lloyd Sabaudo Societa Anonima, etc. v. Elting*, *supra*, 287 U.S. 329 (1932). That case involved the imposition of immigration fines upon a steamship line. The statute there conferred on the Secretary of Labor authority to impose a fine "if it shall appear" to his "satisfaction" that an alien afflicted with any one of certain diseases or disabilities had been so afflicted at time of embarkation for the United States, and that the existence of such disease or disability might have then been detected by means of a competent medical examination.

There was no constitutional requirement as to any formal "hearing". *Oceanic Steam Navigation Co. v. Stranahan*, *supra*, 214 U.S. at 340-343. The statute also was silent in respect of any "hearing" (either "on the record" or otherwise). The Secretary based his challenged fine decisions on his review of the administrative "files" or "records" made in connection with the determination as to the alien's admissibility at time of arrival (in which the steamship line did not participate), the representations contained in the steamship line's letter of protest, the evidentiary materials accompanying such protest, and certain *ex parte* inter-departmental communications.

Before the District Court the steamship line sought to introduce evidence which it had not presented to the Secretary. This new evidence tended to show that no violation of the statute had occurred. But the District Court refused to receive this evidence submitted *dehors* the administrative record. The District Court decided the case on the basis of the informal "record" made before the Secretary, and held that evidence therein supported his action.

The steamship line contended before the Supreme Court that due process of law required that it be accorded a judicial trial in the matter. The Supreme Court, rejecting that contention, stated (287 U.S. at 334):

* * * By the words of the statute the Secretary's is the only voice authorized to express the will of the United States with respect to the imposition of the fines; the judgment of a court may not be substituted for the discretion which, under the statute, he alone may exercise. In conferring that authority upon an administrative officer, Congress did not transcend constitutional limits.
* * *

Thus, it is clear that—even if this case concerned exclusively adjudicatory action (which we deny)—the Court need not invade the area of administrative competence the statute assigns the Secretary in order to “furnish opportunity for proof or disproof” of appellant Seagram’s factual allegations here. For that reason, the principle stated in *Tagg Bros. & Moorehead v. United States*, 280 U.S. 420, 442—443 (1930); *Acker v. United States*, 298 U.S. 426, 434 (1936); cf., *United States v. Carlos Bianchi & Co.*, 373 U.S. 709, 715 (1963), applies here with equal force. In *Tagg Bros.*, Mr. Justice Brandeis pointed out that “where it is believed that the Secretary erred in his findings because important evidence was not brought to his attention, the appropriate remedy is to apply for a rehearing before him or to institute new proceedings [before him].”

Finally, we must note, the two case authorities the Court relied on in its *per curiam* opinion (p. 5, fn. 8) to support its suggestion of judicial competence to conduct a *de novo* trial of the facts here are patently inapposite.

Jordan v. United Insurance Co. of America, 110 U.S. App. D.C. 112, 289 F. 2d 778 (1961), involved an application for license renewal by an insurance corporation which had invested in business in the District of Columbia in reliance upon a prior granted license. Thus, the case is immediately distinguishable.

The case is also distinguishable upon an even more fundamental ground. This Court there determined that due process of law in the indicated circumstances required that an adjudicatory trial-type hearing be accorded. The statute did not make provision therefor. To preserve the constitutionality of the statute, the Court construed it as implicitly authorizing a *de novo* judicial trial. Cf. *The Japanese Immigrant Case* (Ya-

mataya v. Fisher), 189 U.S. 86, 100-101 (1903). That is not the situation here at all.²⁴

Jordan v. American Eagle Fire Ins. Co., 83 U.S. App. D.C. 192, 169 F. 2d 281 (1948), involved rate-making regulation. This Court held (in reliance upon *St. Joseph* and other authorities) that due process of law requires in respect of rate-making "a judicial type of hearing before a capable tribunal." 83 U.S. App. at 199, 169 F. 2d at 288. To preserve the constitutionality of the statute, the Court construed it as implicitly authorizing a *de novo* judicial trial. Thus, that case is likewise clearly distinguishable on the same two indicated grounds.

The essential vice in the Court's view that a *de novo* judicial trial of the facts would lie here was well expressed by Judge Learned Hand in the *National Broadcasting Co.* case. His rationale there, speaking for the District Court, seems irrefutable, whether applied on judicial review of a regulatory—or an *adjudicatory*—action taken by an agency in the exercise of the judgment and discretion confided to it by statute. Judge Learned Hand reasoned that if the Court were to take evidence for itself in a *de novo* judicial trial, it could not weigh that evidence received *dehors* the administrative record with the evidence taken by the Commission, without taking over the Commission's administrative function. That, he stated, the Court did not have power to do. The agency's order had to "stand or fall upon such evidence as it had before it." And "if an aggrieved party wishes to supplement that evidence he must apply to the Commission itself * * *." 47 F. Supp. 940, 947 (1942). The Supreme Court, in affirming Judge Learned Hand's view, stated (319 U.S. at 227): "The Court below correctly held that its inquiry was limited to review of the evidence before the Commission. [Judicial] trial *de novo* of the matters heard by the Commission and dealt with in its Report would have been improper. See *Tagg Bros. v. United States*, 280 U.S. 420 * * *; *Acker v. United States*, 298 U.S. 426 * * *." We believe this fundamental, well settled, separation-of-powers principle clearly governs here.

²⁴ Also see the distinguishment in fn. 15 *supra* of the case authorities relied on in *Jordan v. United Insurance Company of America* for its assertion of judicial power to conduct a *de novo* judicial trial in the circumstances there involved.

In sum, where the statute confers jurisdiction upon an agency to exercise its judgment or discretion in a matter upon its own fact-findings, the Court, unless expressly authorized by law to do so, is not at liberty to conduct a *de novo* trial of the facts, in order to determine whether or not the agency acted arbitrarily or capriciously, or otherwise exceeded its statutory authority. That determination is to be made by the Court as a matter of law on its review of the "record", formal or informal as the case may be, upon which the agency based its exercise of its judgment and discretion. If the Court proceeds otherwise, it unlawfully usurps the agency's administrative function.

CONCLUSION

For the foregoing reasons, rehearing is warranted in this case, and the Court should bring the opinion in accord with proper and established legal doctrine.

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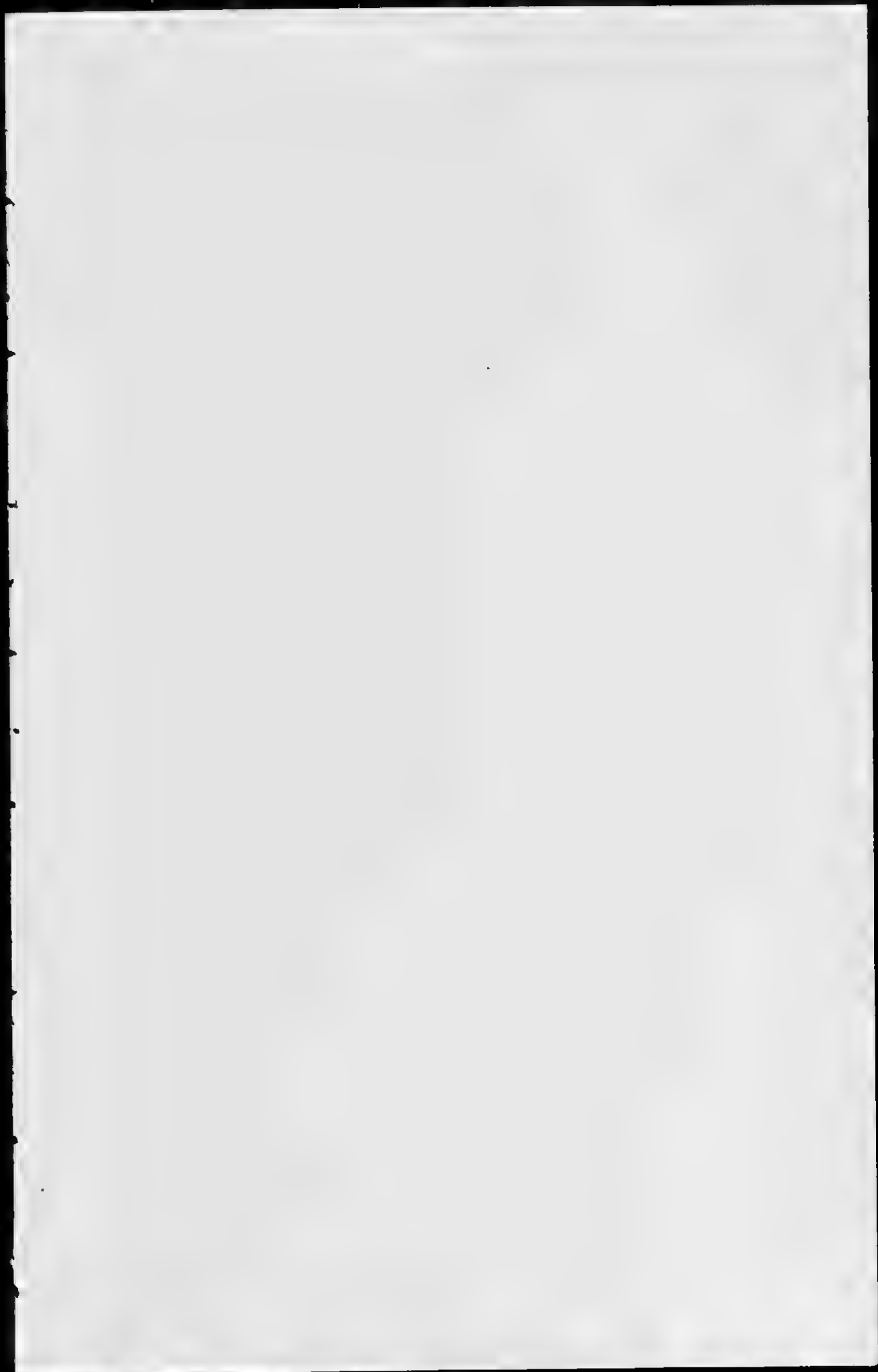
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GIL ZIMMERMAN,
Assistant United States Attorney.

CERTIFICATE OF GOOD FAITH

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

GIL ZIMMERMAN,
Assistant United States Attorney.



REPLY BRIEF FOR APPELLANT

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,465

JOSEPH E. SEAGRAM & SONS, INC.,

Appellant,

v.

HONORABLE DOUGLAS DILLON, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

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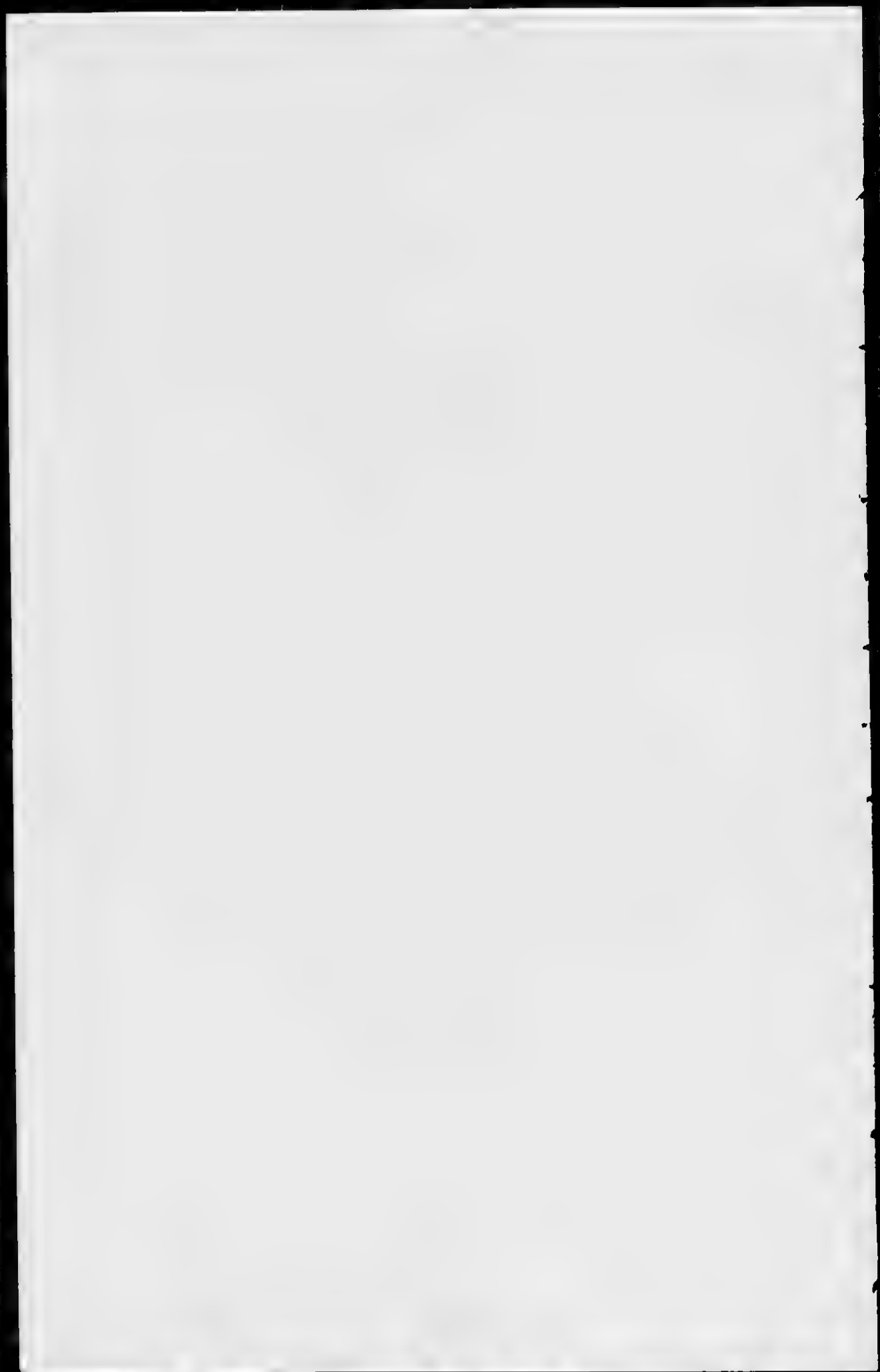
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United States Court of Appeals
for the District of Columbia Circuit

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IN THE
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No. 18,465

JOSEPH E. SEAGRAM & SONS, INC.,

Appellant,

v.

HON. DOUGLAS DILLON, HON. MORTIMER M. CAPLIN, HON.
DONALD W. BACON, HON. DWIGHT E. AVIS, NATIONAL DIS-
TILLERS AND CHEMICAL CORPORATION, SCHENLEY INDUS-
TRIES, INC., STITZEL-WELLER DISTILLERY, INC.,

Appellees.

INDEX.

	PAGE
I.—Appellees misstate the issue.....	1
II.—Appellees ignore the pertinent authorities.....	5
III.—Appellant has followed the proper procedure..	10
A. There is no provision for a hearing before the Agency	10
B. The Act specifically provides for District Court relief	11
C. Appellant was not required to petition the Agency for repeal or amendment of the regulation	11
D. There was no provision for waiver of the regulation as applied to appellant.....	12
E. The doctrine of “primary jurisdiction” is not applicable	14
F. The factual issue here presented is appro- priate for judicial determination.....	15
IV.—The so-called “administrative record” relied on by appellees is utterly inadequate to sup- port the regulation.....	16
A. Appellees’ “exhibits” were not the “record” before the Director.....	16
B. Regulation §5.39(d) is invalid because not supported by the so-called administrative record	16
Conclusion	21

TABLE OF AUTHORITIES.

CASES.

	PAGE
* <i>Armour & Co. v. Freeman</i> , 113 U. S. App. D. C. 37, 304 F. 2d 404, <i>cert. denied</i> , 370 U. S. 920 (1962)....	5, 8
<i>The Chicago Junction Case</i> , 264 U. S. 258 (1924)....	18
* <i>Continental Distilling Corp. v. Humphrey</i> , 95 U. S. App. D. C. 104, 220 F. 2d 367 (1954).....	5, 6, 7, 8, 10
* <i>Continental Distilling Corp. v. Humphrey</i> , 101 U. S. App. D. C. 210, 247 F. 2d 796 (1957).....	5, 6, 7, 8, 10
<i>District of Columbia v. Brady</i> , 109 U. S. App. D. C. 324, 288 F. 2d 108 (1960).....	12
<i>Friend v. Lee</i> , 95 U. S. App. D. C. 224, 221 F. 2d 96 (1955)	5
<i>FPC v. Texaco, Inc.</i> , 377 U. S. 33 (1964).....	13
<i>ICC v. Louisville & N. R. R.</i> , 227 U. S. 88 (1913)....	19
<i>Levers v. Anderson</i> , 326 U. S. 219 (1945).....	10, 11
<i>National Broadcasting Co. v. United States</i> , 319 U. S. 190 (1943).....	9, 19
<i>Norris & Hirschberg, Inc. v. SEC</i> , 82 U. S. App. D. C. 324, 163 F. 2d 689 (1947), <i>cert. denied</i> , 333 U. S. 867 (1948).....	16
<i>United States v. Carlo Bianchi & Co.</i> , 373 U. S. 709 (1963)	9
<i>United States v. Storer Broadcasting Co.</i> , 351 U. S. 192 (1956)	13
<i>United States v. Western Pacific Railroad Co.</i> , 352 U. S. 59 (1956).....	14

* Cases chiefly relied upon are marked by asterisks.

STATUTES.

	PAGE
Administrative Procedure Act,	
Section 4(d) (5 U. S. C. §1003(d)).....	11
Section 5(d) (5 U. S. C. §1004(d)).....	11
Section 10(c) (5 U. S. C. §1009(c)).....	10, 11
Federal Alcohol Administration Act,	
§5(e) (27 U. S. C. §205(e)).....	10, 12, 13

REGULATIONS.

18 C. F. R. §1.7(b).....	13
26 C. F. R. §601.601.....	11, 12, 13
27 C. F. R. §5.39(d).....	16, 19
27 C. F. R. §5.50(a).....	10

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,465

JOSEPH E. SEAGRAM & SONS, INC.,
Appellant,
v.

HONORABLE DOUGLAS DILLON, *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

I.

APPELLEES MISSTATE THE ISSUE.

The briefs¹ of the Government and Intervenor appellees misinterpret the nature of the action and misstate the issue presented and then attempt to refute issues not presented.

The complaint alleged: (a) that appellant (hereafter Seagram) proposed to make a truthful, not misleading and informative statement on a label for its new whiskey, Calvert Extra (JA 12A); (b) that this label was disapproved by the Director under statutory authority, which limits him to forbidding false or misleading labels

¹ References to pages of the Government Appellees' Brief are G-1, G-2, etc. References to pages of Intervenor Appellees' Brief are In-1, In-2, etc.

(JA 11A-13A); and, (c) that it was arbitrary and capricious for the Director to forbid Seagram from making a truthful, not misleading and informative statement on its label (JA 12A-13A). Appellees' action is particularly injurious since Seagram has expended millions of dollars improving the neutral spirits used in its product and is now prevented from making an appropriate statement on its label (JA 14A). No answers were filed, but appellees filed motions to dismiss and alternative motions for summary judgment.

On appeal Seagram asserts that it was error to grant summary judgment since there was an issue of fact to be tried, i.e., whether the proposed label was or was not, false or misleading. However, the trial court not only granted appellees' motion for summary judgment but also granted a motion to strike Seagram's affidavits addressed to this issue. Appellees submitted no affidavits whatever but only certain "exhibits".

Even appellees must concede that an administrative regulation and determination prohibiting the use of a truthful, informative and in no way misleading label is so completely at odds, not only with the statutory purpose and authorization, but with fundamental principles of law, that it must be set aside.

The only basis upon which appellees can sustain the disapproval of Seagram's label is and has to be, that the label is misleading, or at the very least, that there is sufficient basis in the administrative record with reference to *this* label to sustain such a finding as to *this* label. The trial court in striking Seagram's affidavits refused to consider whether this label is false or misleading but rather, at appellees' urging, solely considered the so-called "administrative record" submitted by appellees as "exhibits". However, the record so submitted does not involve Seagram's whiskey or Seagram's label. Indeed there has never been a hearing, much less a factual determination, of whether the proposed label for Calvert Extra is true, informative and not misleading. Seagram's affidavits and exhibits addressed to this issue were stricken by the District Court.

Appellees argue that the record of administrative hearings held in 1935 in connection with the original promulgation of the entire set of alcoholic beverage regulations in 1936, and hearings in connection with proposed changes in those regulations in 1948 and 1956, furnish an administrative record which supports the determination of the Agency in this case disapproving *this* label for *this* whiskey in 1963.²

Appellees reveal the real reason for their opposition to any individual determination of the facts of this particular case: they desire a ruling to be made which will take into consideration the competitive standing of other distillers who may not have stored neutral spirits in the same manner as Seagram. Thus Government appellees state that Seagram "seeks an invidious preferment in the market over its competitors" (G-28), and Intervenor appellees state that Seagram is "seeking to become a beneficiary of unequal treatment" (In-21). Since any decision here would obviously apply equally to all persons who presented similar factual circumstances, it is manifest that appellees are interested more in preserving a competitive status quo than with truthful labeling. Indeed the very intervention of three of Seagram's competitors in this proceeding underlines the nature of the opposition.

Seagram has alleged that it has made a significant advance in the art of blending whiskey by storing its specially distilled neutral spirits for some years in reused cooperage so that the neutral spirits are significantly mellowed and softened. This allegation must be deemed

² Appellees studiously avoid any discussion of the facts in *this* case but prefer to speak solely of the regulation in the abstract. They argue that a determination of the validity of the general regulation is a determination of the facts in this case. On this basis they contend that the facts in this case are irrelevant and that the Court should consider only the validity of the abstract regulation. As pointed out in the text this is not a proper way of deciding the issues raised by this complaint. Seagram is attacking the application of the regulation to it; the general validity of the regulation arises only collaterally. Seagram's neutral spirits are specially distilled and were stored for more than 4 years. This action is not concerned with neutral spirits generally.

true for the purposes of a motion for summary judgment.³ If it is true then Seagram should be permitted to so state on its label. Seagram should not have to petition the Agency for a new regulation or have its right to make a truthful, informative label statement depend upon a counting of its competitors' hands.

The issue here is not the sufficiency of the general "administrative record" as to this regulation in the abstract. The issue is the sufficiency of the record on which *this* label as to *this* product has been disapproved. There is no administrative record addressed to this issue and there is no factual foundation for any holding as to *this* label and *this* whiskey. There was no opportunity to submit such factual material to the Agency—and the District Court refused to consider it.

Both appellees speak of a "trial *de novo*" and attempt to create the impression that Seagram is seeking a trial of issues already heard by the Agency. This is patently not so. Seagram stated in its main brief:

"It is extraordinary for appellees to contend as they did before the District Court that appellant is asking for a 'Trial *de novo* of the matters heard by the Commission.' There was never any hearing before the Commission as to appellant's neutral spirits and whether these spirits improved by storage for more than four years in reused cooperage." (p. 20)

Despite this undisputed fact, the Government appellees continue to misstate Seagram's position; thus the Government appellees state "Appellant contends (Br. Points I & II)⁴ that the District Court erred in striking its affidavits,

³ Intervenor appellees (three competing distillers) have on this appeal (with no record support and all sworn statements to the contrary) attempted to create the impression that Calvert Extra is not a new and different whiskey by referring to it as follows: "... Calvert Extra, a new brand name for appellant's blended whiskey" (In-6). Such a misstatement of the record reveals clearly how appellees attempt to ignore the issue of fact presented to the Court: Is the statement on Seagram's label true and not misleading as to Seagram's new whiskey Calvert Extra?

⁴ The specificity of this citation is remarkable since it includes 15 of the 17 pages of Argument in Seagram's main brief.

and in declining to conduct a judicial trial *de novo* in this matter" (G-5).

The issue in this case is whether Seagram is entitled to a hearing on the allegations made in its complaint—that it has been prevented by the Agency from making truthful and not misleading statements on its proposed label for its new whiskey Calvert Extra, when the statutory authority of the Agency is limited to prohibiting false or misleading label statements. Hearings concerning proposed changes in the regulation which predate the product in question and do not contain a reference to it are no substitute for a factual determination of whether the prohibition of *this* label on *this* whiskey is arbitrary and capricious. Fundamental fairness requires an opportunity to question the application of a regulation in a particular case; yet Seagram has not been given this opportunity.

II.

APPELLEES IGNORE THE PERTINENT AUTHORITIES.

Since appellees misstate the issue presented, it is not surprising that they find it unnecessary to discuss in any detail the pertinent authorities which hold that if administrative action in a particular case reaches a result contrary to the statutory purpose, the action must be set aside. There are no less than three recent decisions of this very Court which hold that a determination of whether a result is contrary to statutory purpose must be based on the facts of the particular case. *Armour & Co. v. Freeman*, 113 U. S. App. D. C. 37, 304 F. 2d 404, *cert. denied*, 370 U. S. 920 (1962); *Continental Distilling Corp. v. Humphrey*, 95 U. S. App. D. C. 104, 220 F. 2d 367 (1954), and 101 U. S. App. D. C. 210, 247 F. 2d 796 (1957); *Friend v. Lee*, 221 F. 2d 96 (1955). These decisions are virtually ignored by appellees. Indeed, Government appellees relegate their discussion of these decisions to a footnote!

In *Continental*, which arose under the instant statute, appellant alleged that a regulation which required it to

state on labels the truthful statement that its whiskey had been stored in reused cooperage, was arbitrary and capricious since Canadian and corn whiskies, which were similarly stored, were not required to. Thus, the basic issue was whether Continental's whiskey was sufficiently different from these other whiskies to justify the discriminatory treatment. This Court held:

"[W]e are not informed by common knowledge or by judicial notice that, in view of the alleged similarity between Canadian, corn and 'Embassy Club' whiskies, a ruling requiring the latter alone to be labelled 'stored in reused cooperage' though the others are also so stored, is not unreasonably discriminatory. The complaint fairly construed raises questions of fact in this regard which calls for a solution through procedures other than dismissing the complaint on motion. . . . Should such discrimination exist, furthermore, it would lead to consumer deception rather than to its avoidance as sought by the statute." (95 U. S. App. D. C. at 108, 220 F. 2d at 371-72).

The case was then remanded to the District Court for a hearing to determine whether there was a reasonable basis for discrimination between Continental's whiskey and other whiskies. No amount of administrative hearings on the general regulation involved could resolve the particular issue presented by the application of the regulation to the facts of that particular case. Similarly in the instant case, this Court is not informed by "common knowledge" or "judicial notice" that the specially distilled neutral spirits in Calvert Extra have not improved by storage for more than 4 years in reused cooperage. Thus, there must be a factual hearing to determine this issue.

Government appellees deal with *Continental* in a footnote at the end of their brief (G-28-29). They attempt to make two "distinctions": (1) that it involved "invidious discrimination", and (2) that the "administrative records" were not before the Court. Neither distinction is meaningful.

An allegation that agency action requiring the making of a truthful statement resulted in unreasonable discrimi-

nation in violation of the statutory purpose of preventing deception (as in *Continental*) is no different from the allegation that agency action resulted in prohibiting the making of truthful and not misleading statements (as here). In both cases such agency action is unlawful and *Continental* holds that such an issue should be resolved by the District Court after hearings and determination of the factual contentions in the particular case.

The second attempted distinction is equally meaningless. It is true that the "administrative records" were not before the Court in *Continental*. However, *Continental* admitted that the regulation by its terms applied to its whiskey. (95 U. S. App. D. C. at 107, n. 3, 220 F. 2d at 370, n. 3). Thus *Continental* was attacking the validity of the regulation insofar as it applied by its terms to its whiskey in the same sense in which Seagram is challenging the validity of the instant regulation insofar as it applies to Calvert Extra. Doubtless, the administrative record with reference to the label application filed by *Continental* was the same as here; i.e., there was no evidence before the Director with reference to the similarity between *Continental's* whiskey and other whiskeys, just as there was no evidence before the Director as to the truth of the statements made concerning the neutral spirits used in Calvert Extra. Thus the so-called "administrative record" is immaterial.

In *Continental* the Government apparently did not even offer the administrative hearings concerning the general promulgation of the regulation in question until the case was remanded to the District Court for a hearing. The District Court refused to admit these records. On appeal from the District Court decision after the factual hearing, this Court made the following observation:

"Continental objected to the receipt in evidence of the record of these hearings on the ground that it was not challenging the validity of the reused cooperage regulation, except as applied to it, and the evidence was not received." (101 U. S. App. D. C. at 212, 247 (F. 2d at 798, n. 2).

This Court's footnote made no suggestion that the refusal to receive these hearings was erroneous and we sub-

mit that this quite clearly indicates the distinction between an action to set aside a regulation in the abstract in which the issue is the sufficiency of the record pertaining to the promulgation of the regulation and an action challenging the validity of a regulation insofar as it applies in a particular case. In the latter situation the administrative record could be relevant only insofar as it contains evidence with reference to the particular application of the regulation. The administrative record concerning the regulation in the abstract was evidently found to be of no relevancy in *Continental* and was excluded.

Intervenor appellees' attempted distinction of *Continental* is almost identical to that of the Government appellees. Intervenor state that "Obviously, if the formal administrative records had been before the Court as they are here, the Court, with full knowledge of the reasons for the apparent discrimination, could have based its decision on that knowledge" (In-29).

However, the alleged "formal administrative records" before the Court in the instant case do not give any basis for a determination that the proposed statement with reference to the neutral spirits used in Calvert Extra are false and misleading. This record does not give "full knowledge of the reasons" why Seagram has been prohibited from making what it alleges are truthful and not misleading statements on the label for Calvert Extra. This Court is no better informed with reference to the neutral spirits used in Calvert Extra than it was with reference to the alleged similarity between Continental's whiskey and other whiskies. A factual hearing is required in this case just as it was in *Continental*.

The most recent decision of this Court, which is directly, in point is *Armour & Co. v. Freeman*, 113 U. S. App. D. C. 37, 304 F. 2d 404, cert. denied, 370 U. S. 920 (1962). In this case the agency promulgated a regulation requiring hams with a certain water content be labelled "Imitation Ham". Armour brought an action to enjoin the application of the regulation to it and to have the regulation declared invalid

since it was contrary to the statutory purpose of preventing deception.

Here again the issue was whether the application of a regulation to particular hams was arbitrary and capricious. The Court in that case held that this was an issue of fact which had to be tried. The only distinction of this case made by any of the appellees is on the ground that the "formal records of the agency's hearings" concerning the regulation in the abstract were not before the Court (In-30). Yet the Government in that case did not offer the "formal records of the agency's hearings". However, excerpts of the hearings were presented to the Court by way of affidavit, and it nevertheless required a determination of the issues presented on the basis of the facts in that particular case.

The cases cited by appellees in which review by a court was limited to the administrative record in connection with the promulgation of a regulation in the abstract are actions attacking not the application of regulations in particular cases, but rather attacking in the abstract the regulations themselves. See, e. g., *National Broadcasting Co. v. United States*, 319 U. S. 190, 225 (1943) discussed at pp. 19-21 of appellant's brief. The case of *United States v. Carlo Bianchi & Co.*, 373 U. S. 709 (1963) is not to the contrary, as there was a full hearing before the agency as to the facts of that particular case. There has never been such a hearing in the instant case and there is no resemblance whatever between the "exhibits" submitted by appellees here and the record of particularized exhaustive hearings in *Bianchi*.

We again emphasize Seagram is not seeking a *de novo* trial; it is requesting a hearing and a determination of the issues of fact raised by its complaint. These issues have never been tried.

III.

APPELLANT HAS FOLLOWED THE PROPER PROCEDURE.

Much of appellees' briefs are devoted to an imaginative outline of other ways in which appellant could have proceeded, assuming that the prohibited label was true and not misleading. In so doing appellees ignore the clear cut procedure set forth in the Federal Alcohol Administration Act, 27 U. S. C. §205(e) and the regulations promulgated thereunder (27 CFR §5.50 (a) *et seq.*)

A. There is no provision for a hearing before the Agency.

The applicable regulations provide (27 CFR §5.50(a)) that no person shall bottle distilled spirits unless he has a certificate of label approval. It reads in part:

"Such certificate of label approval shall be issued by the Director upon application made on the form designated 'Application for Certificate of Label Approval under the Federal Alcohol Administration Act' (Form 1649), properly filed and certified to by the permittee."

There is no provision in the regulations or in the statute for a hearing upon such applications, yet appellees contend that Seagram should have in some way presented evidence to the Agency in support of its application. If there had been a procedure for this, Seagram would have done so.⁵ The identical situation was presented in *Continental* and no one suggested that *Continental* had to go back to the Agency and request a hearing which was not provided for by the regulations.

⁵ Appellees' suggestion that Seagram should have applied for rehearing is likewise without merit. Section 10(c) of the Administrative Procedure Act specifically grants appellant the right to seek judicial review without seeking reconsideration before the agency. 5 U. S. C. §1009(c); see *Levers v. Anderson*, 326 U. S. 219 (1945) (wherein the Court held a petition for rehearing unnecessary, even though a regulation allowed one to be filed).

B. The Act specifically provides for District Court relief.

Seagram's right to seek judicial relief is governed by the statute and valid regulations promulgated thereunder. *Levers v. Anderson*, 326 U. S. 219, 221 (1945). Section 5(e) of the Act grants to an applicant the right to bring suit in the District Court upon any final action upon an application for label approval, and there are no administrative regulations qualifying this right. Section 5 gives District Courts "jurisdiction of suits to enjoin, annul or suspend . . . any final action . . . upon any label application."

This is precisely the action taken by Seagram in this case. This clear-cut procedure for a suit in the District Court in which a hearing is held is ignored by appellees in their search for some way of avoiding a decision on the merits.

C. Appellant was not required to petition the Agency for repeal or amendment of the regulation.

Appellees' suggestion that a litigant, challenging the application of a regulation, must first petition for a change in the regulation before seeking a judicial determination as to whether it is valid as applied to him, is absurd.

Yet Intervenor appellees point out the provisions of the Administrative Procedure Act, 5 U. S. C. §1003(d)⁶ and 26 CFR §601.601 (In-21) and assert that Seagram should have invoked these sections before applying to the District Court. These sections govern rulemaking. Section 4(d) of the Administrative Procedure Act, 5 U. S. C. §1003(d) provides that "every agency shall accord any interested

⁶ The Intervenor also cite 5 U. S. C. §1004(d). This section governing declaratory orders authorizes the agency in its sound discretion to issue a declaratory order to terminate a controversy or remove uncertainty. Its relevance here is doubtful, and in any case, it is wholly inapplicable since §1004 applies only in "case[s] of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . ." There is no such requirement or authorization upon application for label approval. Furthermore, Section 10(e) of the Administrative Procedure Act (5 U. S. C. §1009(e)) specifically provides there is no need to petition for a declaratory order before seeking judicial review.

person the right to petition for the issuance, amendment, or repeal of a rule." Similarly, the Internal Revenue Service Regulation 26 C.F.R. §601.601(c) states in pertinent part: "Interested persons are privileged to petition for the issuance, amendment, or repeal of a rule." Neither the Administrative Procedure Act nor the cited regulation make any provision for waiver of a rule in a specific case.

To contend that Seagram has not exhausted its administrative remedies because it failed to petition for a change in the regulation is of absolutely no substance. In *District of Columbia v. Brady*, 109 U. S. App. D. C. 324, 326, 288 F. 2d 108, 110 (1960), this Court held, after noting that exhaustion of prescribed administrative remedies had been a long settled rule of judicial administration:

"But if the administrative remedy is an alternative remedy it is not 'prescribed' within the meaning of that rule and need not be followed. Common-law remedies survive unless the administrative remedy is prescribed, i.e., required."

Section 5(c) of the Act (27 U. S. C. §205(e)) specifically prescribes a remedy of a suit in the District Court to enjoin, annul, or suspend in whole or in part any final action by the Secretary upon any application under this subsection. Therefore, not only does Seagram have its common law remedy to reverse the action of appellees, but it also has specific statutory authorization for the present suit.

No case has ever required an attempt to obtain discretionary "legislative-type" relief as a condition precedent to invoking a statutorily bestowed right of judicial action. None of the cases cited by appellees hold that a petition to amend a rule must be made in order to exhaust administrative remedies nor do they even imply that such procedures *are* remedies.

D. There was no provision for waiver of the regulation as applied to appellant.

Appellees also argue that Seagram should have requested a waiver of the application of the regulation in

this particular case, citing *FPC v. Texaco, Inc.*, 377 U. S. 33 (1964) and *U. S. v. Storer Broadcasting Co.*, 351 U. S. 192 (1956) in support of this contention. However, the applicable regulation in those cases provided for petitions for the "issuance, amendment, *waiver*, or repeal of a rule."

In the *Texaco* case, the Supreme Court stated

"In the present case, as in *Storer*, there is a procedure provided in the regulations whereby an applicant can ask for a *waiver* of the Rule complained of." (377 U. S. at 40) (Emphasis added)

The Court acknowledged that facts might be alleged sufficient to provide a basis for waiver of the rules but no attempt had there been made. The Regulation cited by the Court was 18 C.F.R. §1.7(b) which provided in relevant part:

"A petition for the issuance, amendment, *waiver*, or repeal of a rule by the Commission shall set forth clearly and concisely petitioner's interest in the subject matter, the specific rule, amendment, waiver or repeal requested and cite by appropriate records the statutory provision or other authority therefor." (Emphasis added)

Intervenor appellees state that this procedure was also available to Seagram here (In-21, 23). However, this procedure for waiver of a rule is not incorporated in the statute or Internal Revenue Service regulations applicable here. Both section 4 of the Administrative Procedure Act and 26 C. F. R. §601.601 provide only for a petition to issue, amend or repeal a rule, and Section 5(e) of the Act provides for suit in the District Court after final agency action on a label application.

A procedure permitting an application for the waiver of a rule in a particular case presents an opportunity to show the inapplicability of the regulation as promulgated to the facts thus revealed under the applicable statutory standard. On the other hand, the proponent of amendment or repeal of a rule has a burden far beyond presenting the

facts of his particular case. No authority holds that where there is no procedure for the waiver of application of a regulation that an aggrieved party must first petition for its repeal before challenging its application in Court. Certainly there is no such authority in a situation where the applicable statute clearly provides for Court action.

E. The doctrine of "primary jurisdiction" is not applicable.

The Government appellees apparently do not join with the Intervenor appellees in suggesting the applicability of the doctrine of primary jurisdiction. This doctrine is defined in *United States v. Western Pacific Railroad Co.*, 352 U. S. 59 (1956), quoted in Intervenor appellees' brief:

"'Exhaustion' [of administrative remedies] applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is *originally cognizable in the courts*, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body;" (352 U. S. 59 at 63-64) (Emphasis added).

In the instant case it is quite clear that Seagram's application for label approval was cognizable by and indeed, actually denied by, the administrative agency in the first instance. It was in no sense "originally cognizable in the courts". Indeed, the suggestion that the Courts should stay proceedings in this case until the Agency has acted is incredible since the Agency has acted and Seagram is coming into court pursuant to a specific statute authorizing a suit in the District Court as to agency action disapproving an application for label approval.

Appellees' suggestion utterly ignores the nature of the issues here presented for determination. The appropriate agency has acted—it has made a determination purportedly

pursuant to statutory authorization that Seagram's label should be disapproved. It has done so on the basis of a general regulation without considering the facts of this particular case. The issue presented is whether this Agency action was arbitrary and capricious. To suggest that this matter go back to the Agency is merely to recognize the inadequacy of the facts upon which the Agency acted.

F. The factual issue here presented is appropriate for judicial determination.

Intervenor appellees state flatly that the matter should go back to the Agency so that it can come up in the context of a petition for a change in the regulation at which "all interested parties" could be heard. However, Seagram is not attacking the regulation in the abstract or asking for a new regulation. It is merely contending that under the facts of its individual case it is arbitrary and capricious for the Agency to prohibit its making a true, informative and not misleading statement on its labels for Calvert Extra.

This raises the simple issue of whether the proposed label is true and not misleading and this issue should be determined on the basis of the facts with reference to this product and this product alone. There is no necessity for an industry wide conference or obtaining a consensus of competitors on whether or how the general regulation should be revised.

While it is true that the solution of the issue in this case will require expert testimony, there is nothing abstruse about the issue or unusual about a court or jury deciding technical or scientific questions. Indeed, the instant issue can be largely resolved merely by tasting and smelling the exhibits which were submitted by Seagram in connection with the motion for summary judgment.

It may be that if it is held that the instant label is true and not misleading that it will be necessary for the Agency to rephrase its regulation. This can easily be done following usual Agency procedures. The Court need not concern

itself with the problem of redrafting the regulation. In the meantime Seagram is suffering irreparable damage by the application of this regulation to it. Seagram's damage may well amount to millions of dollars since it has been prevented from stating true and informative facts on its label.

IV.

THE SO-CALLED "ADMINISTRATIVE RECORD" RELIED ON BY APPELLEES IS UTTERLY INADEQUATE TO SUPPORT THE REGULATION.

A. Appellees' "exhibits" were not the "record" before the Director.

As pointed out previously (Main Brief, p. 17) the 17 exhibits submitted in the District Court by Government appellees do not comprise the administrative record in any proceeding. They cannot be considered a part of the "record" before appellee Avis, and indeed they were not certified to be the record before him. Consequently, his action may not be upheld by verification of documents not considered by him. *Norris & Hirshberg, Inc. v. SEC*, 82 U. S. App. D. C. 324, 326, 163 F. 2d 689 (1947), *cert. denied*, 333 U. S. 867 (1948).

B. Regulation §5.39(d) is invalid because not supported by the so-called administrative record.

Accepting *arguendo* appellees' contention that Seagram is attacking the validity of regulation 27 C. F. R. §5.39(d) in the abstract, the regulation is itself invalid.

The relevant statute, 27 U. S. C. §205(e) provides that it shall be unlawful to sell or ship distilled spirits unless such products are "labelled in conformity with such regulations, to be prescribed by the Secretary of the Treasury . . . as the Secretary of the Treasury finds to be likely to

mislead the consumer." No such finding appears among the "exhibits" offered by appellees.

Appellees in their enthusiasm for the "administrative record" which they submitted as "exhibits" attempt to conceal its glaring inadequacies. The 1935 hearing transcript with reference to the promulgation of the regulation in question was not submitted in this case. While appellees eventually admit that "there was no evidence directed to this proposal [regulation] at the October 30, 1935 hearing." (In.-12, G-3, n. 3) (which fact is not in this record), they attempt to give an entirely contrary impression of the so-called "administrative record".

Government appellees state:

"The legislative-type labelling regulations collaterally attacked here were issued in 1936—some 28 years ago. They were issued by the Administrators only after holding a legislative-type hearing, such as is prescribed by the Act. At that hearing all interested parties—including plaintiff—were afforded full opportunity to participate in the Administrator's rule-making process through the submission to the Administrators of whatever written data, views, arguments, etc. they desired to have the Administrators consider before issuing the regulations" (G-3).

They state further:

"The particular Regulation appellant challenges here . . . was promulgated in 1936 with the full consensus of the Distilled Spirits Industry. . . . No one in the Industry took issue with the promulgation of the Regulation in its present form. (J. A. I. 33A-48A)" (G-7).

There is no evidence of record in this case to support these statements, and appellees' page reference is to the text of the regulation and not to any statement in the record, as might be implied from the context.

Government appellees also attempt to confuse the record by stating that Seagram is seeking for the "first time . . . to raise an issue" on this appeal with reference to whether

all of the administrative records have been submitted to the District Court.⁷ They state:

"... To dispel any doubt, Government appellees assert here that the certified administrative records filed by them in the District Court comprise the *entire* administrative records relating to the challenged Regulation.

"They note, too, these records have always been public and available to appellant for examination at any time. The availability of these records is generally well known to members of the Distilled Spirits Industry" (G 3-4, n 3).

Of course, it is completely improper for facts asserted on appeal to be used to bolster the decision appealed from. However, the real significance of this statement is its utter lack of candor. Rather than admit that the 1935 hearings have not been presented, appellees seek to give the impression that these hearings are not only before this Court but fully support the regulation in question.

Intervenor appellees create a similar misleading impression: they state that the administrative records submitted to the District Court fully advised the Court "of the considerations which caused the 'administrative agency' originally to issue the challenged Regulation in 1936 . . ." (In-8). This is certainly misleading when there is no record at all with reference to the hearing in 1935 preceding promulgation of the regulation in 1936. "Facts conceivably known to the Commission but not put in evidence will not support an order." *The Chicago Junction Case*, 264 U. S. 258, 263 (1924).

The statute, 27 U. S. C. §205(e) provides for a hearing prior to prescribing regulations. "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it." 264 U. S. at

⁷ Seagram challenged these "exhibits" in the District Court in its Points and Authorities in Opposition to the Motions to Dismiss (p. 30, n), and Seagram pointed out that the 1935 hearing transcript was not even part of these "exhibits." (*Id.* at 31.) Likewise Seagram's Statement of Genuine Issues specifically questioned this so-called administrative record. (JA 82A-83A.)

265. It follows that promulgation of regulation §5.39(d) was arbitrary action, for there is no evidence of record in the exhibits submitted by appellees to support a finding of the fact by the Secretary which is required to validly issue the regulation. Thus, as pointed out in *ICC v. Louisville & N. R. R.*, 227 U. S. 88, 91 (1913) a "finding without evidence is arbitrary and baseless."

Even under the principal case relied upon by appellees, *National Broadcasting Co. v. United States*, 319 U. S. 190 (1943), it is clear that the regulation may not be upheld upon the basis of the 1935 hearing, which was not introduced, but which appellees admit contained "no evidence directed to this proposal [regulation]" (In-12). If this were an action attacking the general validity of a regulation and not its application and, as in *National Broadcasting*, this Court were "limited to review of the evidence before the Commission" as to the validity of the regulation, there would be no evidence to support the supposed finding of the Director here. *Id* at 227. As Judge Learned Hand stated in the *National Broadcasting* case, the orders "must stand or fall upon such evidence as it had before it." 47 F. Supp. 940, 947 (1942).

Attempts were made in 1948 and 1956 to change the regulation which was promulgated in 1936. In 1956 it was argued that the burden to support a change in this regulation was now on the proponents of the proposal for a change (G-14). But such burden was evidently never met when the regulation was promulgated.

Appellees have quoted extensively from the hearings in 1948 and 1956 subsequent to the promulgation of the regulation. However, appellees cite no authority for the proposition that the validity of a regulation may be sustained on the basis of hearings subsequent to the promulgation of the regulation. If the question is whether the regulation was properly issued, then proceedings subsequent to the issuance of the regulation are wholly irrelevant. To sustain a regulation upon such *ex post facto* matter would be clearly erroneous. Obviously, the issues in the 1948 and 1956

hearings were quite different from the issues to be determined and the facts to be found in order validly to promulgate the regulation in 1936.

Appellees' position evidently is that the hodge-podge of unsworn statements by lawyers and in briefs, which were submitted in 1948 and 1956 at hearings in connection with proposed changes in a regulation, is a sufficient substitute for a hearing as to whether the statements made on the label for the then not yet created Calvert Extra is true and not misleading. Seagram maintains that general hearings in connection, not with the original promulgation of a regulation but with reference to proposed changes in it, are no substitute for a factual hearing as to whether the application of a regulation in a particular case is arbitrary and capricious.

It should also be observed that even in the 1948 and 1956 hearings the statements made were not in the nature of expert testimony but rather in the nature of statements by interested parties, and no laboratory samples were submitted or examined. Further there is an utter lack of any showing of what the consumer understands when he reads a statement as to the storage of neutral spirits. Would a consumer be misled by a statement that neutral spirits used in a blended whiskey were stored for more than four years? There is nothing in the exhibits other than the rankest conjecture on this question, which is the only material issue presented.

Seagram does not wish, however, to discuss in detail these hearings since at best they are relevant only to a spurious issue. The real issue here is whether Seagram's proposed label on its new whiskey Calvert Extra is true and not misleading and whether if it is, the Director can prohibit its use. These issues cannot be determined on a motion for summary judgment.

Conclusion.

The decision of the District Court granting summary judgment should be reversed and the case remanded for further proceedings.

Dated: September 1, 1964

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,465

JOSEPH E. SEAGRAM & SONS, INC., Appellant,

v.

HONORABLE DOUGLAS DILLON, ET AL., Appellees.

Appeal From the United States District Court for the
District of Columbia

PETITION OF NATIONAL DISTILLERS AND CHEMICAL CORPORATION,
SCHENLEY INDUSTRIES, INC., AND STITZEL-WELLER DISTILLERY, INC.
FOR REHEARING EN BANC

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United States Court of Appeals
for the District of Columbia Circuit

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FOR REHEARING EN BANC

Petitioners respectfully request rehearing by the full Court of this case, in which a panel of this Court filed its opinion on January 21, 1965. The case arises on appeal from an order of the United States District Court for the District of Columbia which granted motions for summary judgment filed by petitioners and the government appellees. The lower court's order was affirmed without prejudice by the opinion of a panel of this Court. Petitioners are not seeking rehearing of this aspect of the panel's opinion. They are seeking rehearing of those portions of the panel's opinion which held that:

1. "The point upon which the proceeding devolves is the approval vel non of this label." (Slip opinion, page 6) This finding was made after the panel erroneously concluded that this proceeding did not involve the rule making authority of the Secretary of the Treasury and that the records of public hearings -- which are required by the Act before a rule can be promulgated and which fully support the validity of the regulation as applied to Seagram's neutral spirits -- have no bearing on this case; and

2. ". . . Seagram had no established procedural remedy available in the agency." (Slip opinion, page 4) As a result of this erroneous finding the panel fashioned a procedural remedy which allows Seagram to resubmit its label to the Secretary with a proffer of the evidence which it deems sufficient to require approval of the label. The panel also specified that a judicial trial de novo would be available to review the Secretary's decision.

These two points merit the consideration of this Court en banc because they go to the very heart of the administrative process. The panel places much more authority in the hands of the Secretary than he is given by the Act. Under the

Act he can only approve labels which conform to regulations promulgated after notice and public hearing. Under the panel's procedure he is encouraged to approve labels which violate the specific terms of the regulations upon an en camera proffer of evidence, without notice or hearing to competing distillers and other interested and affected parties, and, contrary to the Act, without any controlling regulation whatsoever. This Court should not permit ad hoc decisions to replace regulations which have the force and effect of law.

Petitioners acknowledge that if a regulation outlives its purpose it should be amended or repealed. The proper course of action should be decided on by the Secretary after notice and public hearing as prescribed by the Act. Seagram has a procedural remedy to accomplish this under either the Administrative Procedure Act (5 U.S.C. §1003(d)) or the Secretary's regulations (26 C.F.R. §601.601(c)). Therefore, in order to promote the fair administration of the Federal Alcohol Administration Act and encourage confidence in the stability of the regulations, this Court en banc should affirm without more the decision of the lower court.

STATEMENT

Seagram distills, blends, bottles and markets, among other things, the blended whiskey which is the subject matter of this case. It is seeking to obtain approval of a label for this product which will state a claim of age for the neutral spirits contained therein.^{1/}

In support of its claim, Seagram asked the Court to find arbitrary and capricious a regulation which has the effect of prohibiting a product from being at once described on the label as both neutral and as also having an unique delightful taste of its own resulting from storage. Seagram is arguing for the right to show that spirits which are offered to the public as "neutral" are not in fact neutral.

The administrative regulation, which has been continuously in effect for more than thirty years, forbids age claims for neutral spirits because of a finding by the Secretary of the Treasury, after notice and public hearing prescribed by statute, that such age claims are misleading (27 C.F.R. §5.39(d)). Seagram's application for label approval was denied by the government appellees on the basis of Section 5.39(d).

^{1/} Neutral spirits (or alcohol) make up sixty-five percent by volume of the blended whiskey.

The Federal Alcohol Administration Act requires the Secretary to promulgate regulations prohibiting, amongst other things, and irrespective of falsity, such statements relating to age and manufacturing processes as he finds to be likely to mislead the consumer (27 U.S.C. §205(e)).

The petitioners (Intervenor Appellees) are also distillers which market spirits in active competition with Seagram, with each other, and with all other distillers. While petitioners have an obviously vital economic stake in the outcome of these proceedings, their paramount interest is the maintenance of stability in the regulatory processes. The distilling industry must make management decisions involving hundreds of millions of dollars on the basis of the government's regulations. Such decisions relate to the production of products for sale some five to eight years in the future and inventories must be programmed years in advance. Prudent decisions and operations will be impossible if regulations are at all times subject to change without notice or hearing by ad hoc decisions, first by the Secretary and then by the courts on the basis of the evidence of a single applicant.

I

THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT
THE VALIDITY OF THE REGULATION AND ITS
APPLICATION TO SEAGRAM'S NEUTRAL SPIRITS

The lower court found (1) that the proposed label does violate the regulation; (2) that the regulation is not arbitrary and capricious but was validly adopted under the authority of the Federal Alcohol Administration Act; and (3) that the plaintiff's contention that the regulation is being arbitrarily and capriciously applied to plaintiff is without merit as a matter of law (J.A., Vol. I, p. 90A).

The panel's decision does not pass on the validity of these findings. The panel held that the point upon which this proceeding devolves is the approval vel non of Seagram's label. It was immaterial, in the view of the panel, that a valid regulation required denial of Seagram's application for label approval. In this respect, the panel's decision is contrary to the decision of the Supreme Court in Federal Power Commission v. Texaco, Inc., _____ U.S. _____, 12 L.Ed 2d 112 (1964), where that Commission, after giving interested parties notice and opportunity to submit views in writing, but no hearing, adopted regulations providing that contracts containing certain

types of pricing clauses would be rejected out of hand if they were the subject of an application for a certificate of public convenience and necessity. Applications containing the prohibited pricing clauses were filed and rejected without hearing because of the regulation. The Supreme Court affirmed the Commission's action and, in passing on a contention that the rule making proceeding deprived the applicant of a hearing under the statute, the court held:

"The only hearing to which Pan American so far has been entitled was given when the regulations in question were adopted pursuant to §4(b) of the Administrative Procedure Act." (12 L.Ed 2d at p. 120)

This principle is applicable here. The Secretary's regulations, when properly promulgated, have the force and effect of law. The record in this case, as discussed at pages 9-23 of petitioners' brief, shows that the regulation, promulgated in 1936, is well within the scope of the Act; that it was properly issued after the required statutory notice and opportunity for hearing; and that the Secretary's finding that age claims for neutral spirits are misleading is fully and satisfactorily supported and explained by the records of two public hearings held in 1948 and 1956. In

these circumstances, this court, sitting en banc, should affirm the judgment of the lower court.

As shown in the point next below, this disposition will not prejudice Seagram since there is an available administrative procedure which, in cases like the one at bar, will "meet the requirements of justice and basic principles" for all affected and interested parties.

II

THE PANEL DID NOT HAVE TO FASHION AN ADMINISTRATIVE REMEDY

The validity of a regulation which has been in effect for more than thirty years is being challenged. The challenge is predicated on certain scientific and technological improvements which allegedly make it possible to produce "improved" neutral spirits.^{2/} Seagram's rationale is that it is unfair to apply the regulation to such neutral spirits as have been improved by scientific advances since the regulation was promulgated. Petitioners respectfully submit (a) that this type of dispute must be resolved by the agency

^{2/} Isn't it confusing to ponder the question whether an "improved" neutral spirit is one which is less flavorful and therefore more neutral or one which is more flavorful and therefore less neutral?

in the first instance under its statutory authority to prescribe regulations and (b) that Seagram, contrary to the panel's decision, has an established procedural remedy available in the agency by which it can bring this matter to a head by petitioning the Secretary for the issuance, amendment, or repeal of a rule (26 C.F.R. §601.601(c); 5 U.S.C. 1003(d)).

In support of its position petitioners respectfully show the following:

1. Insofar as this case is concerned, Section 205(e) of the Act evidences two basic Congressional intents. First, it provides that no distilled spirits shall be introduced into interstate commerce "unless such products are labeled in conformity with" regulations to be prescribed by the Secretary and, second, to insure fair competition -- as shown by the title of 27 U.S.C. §205 -- it requires notice and public hearing before a regulation can be promulgated. If, as Seagram erroneously contends, its neutral spirits are not or should not be covered by the regulation in question then the simple fact is there is no regulation governing the labeling of this product and, therefore, no authority in the Secretary

to approve the label. If Seagram's alternative contention that the regulation is invalid if it applies to its neutral spirits is accepted the same conclusion would follow. In either event, the necessity for a regulation to control the labeling of this allegedly new product would be manifest. This would carry out the first intent of Congress. The second intent would be fulfilled by the Secretary giving notice of and holding a public hearing as to the need for and the type of regulation, if any, which is required to properly identify and label this "new" product. Anything short of this will deprive petitioners of their statutory right to be heard.

Therefore, insofar as the decision of the panel sanctions a practice whereby Seagram, or any other applicant, can make an en camera presentation to administrative officials, it establishes a procedure which violates the intention of Congress and undermines the petitioners' right to be heard.

2. This Court has recognized that it has limited jurisdiction in matters of this kind. It will not grant the affirmative relief Seagram is seeking.^{3/} To do so would be

^{3/} The complaint, inter alia, seeks a declaration that the age claim is not misleading and a decree ordering the government defendants to issue the certificate of label approval (J.A., Vol. I, p. 14A).

an unwarranted intrusion of the judiciary into the administrative function. This Court, following basic legal principles, so held in Continental Distilling Corporation v. Humphrey, 101 U.S. App. D.C. 210, 247 F.2d 796 (1957), where it said:

"* * * that the Court cannot substitute its judgment for that of the administrative agency and devise the appropriate regulations or labeling."
(101 U.S. App. D.C. at p. 211)

Therefore, even a trial de novo could not afford the final affirmative relief Seagram is seeking. The final solution lies in an administrative hearing to determine whether an age claim for Seagram's neutral spirits is or is not likely to mislead the consumer. This is at once both the logical and judicial answer for it will not only insure the rights of all parties to be heard but it will also afford a complete record for ultimate judicial review and thus satisfy the requirements of due process.

3. Seagram has an available administrative remedy which it bypassed in the hope that it can obtain judicial amendment of the regulation. The history of the regulations and Seagram's actions proves this beyond doubt.

In 1936, the Secretary of the Treasury, pursuant to the authority vested in him by 27 U.S.C. §205(e), established

a detailed and comprehensive set of regulations for the control of labeling practices. These regulations include specific standards of identity for the various classes of distilled spirits. Neutral spirits comprise one class (27 C.F.R. §5.21(a)). In order to prevent consumer deception, the Secretary found it necessary to prohibit age claims for neutral spirits from appearing on the labels of such spirits. This prohibition has been continuously in effect for more than thirty years.

During this period the Secretary has given notice of and held two hearings on proposals to amend Section 5.39(d) which, if adopted, would have permitted such labeling statements as Seagram now desires to make. The record of these hearings, the first held in 1948 and the second in 1956, overwhelmingly supports the Secretary's regulation in general and as applied to Seagram's product.^{4/}

Seagram supported the continuation of the prohibition against age claims for neutral spirits at the 1948 hearing, as did every other member of the industry. It was one of

^{4/} The 1948 hearing conclusively shows that the storage of neutral spirits in used whiskey barrels was not new even in 1948 (J.A., Vol. II, pages 134A-136A).

only two members of the industry favoring the proposed amendment at the 1956 hearing, and, even then, it did not present the results of the studies it had been making for many years.

In 1949, Seagram began studying the effect upon neutral spirits of their storage in used whiskey barrels and by 1958 it had commenced storing neutral spirits in such barrels with the intent of using such spirits in a new blended whiskey (J.A., Vol. I, 66A-68A). Nothing more of moment occurred until January 28, 1963, when Seagram filed its application for label approval. It was rejected the same day and Seagram filed suit in the lower court the following day. During all this period it well knew that Section 5.39(d) would bar the age claim it intended to make. Seagram began publicizing its "new" blend in early February, 1963, and it has been successfully marketing its product since that time (J.A., Vol. II, pp. 98A-102A).

At any time during this period Seagram could have petitioned for the issuance of a rule creating a new standard of identity for its new product or it could have sought the repeal or amendment of Section 5.39(d). The way is still open and Seagram, even at this time, could seek such relief.

Neither the course of action selected by Seagram nor that authorized by the panel will meet the requirements of justice and basic principles. The very nature of the regulated industry requires that every distiller have opportunity to be heard before changes are made in the rules with which they must live.

4. The industry has lived with the Act and the Secretary's regulations for thirty years with a minimum of grumbling. The stability of the regulations has been the major factor upon which management has made decisions involving hundreds of millions of dollars. Of necessity, these decisions frequently involve products produced today for consumption many years in the future. Thus, the continuing vitality of the regulations under which the industry must live is of vital concern to petitioners.

The government appellees have recognized this fact of regulatory life and their regulations and amendments have been made on a prospective basis. Prospective amendments to regulations are fair and serve to maintain the regulatory parity between all members of the industry. Amendments without notice or hearing upon petition of individual distillers

must inevitably result in discrimination against all the other distillers which have conducted their business in accordance with and in reliance upon the regulations being equally binding on all.

If the panel's procedural remedy is approved, Seagram may be placed in a favored position, for the substance of the decision is that the regulations will be subject to ad hoc decisions on the basis of proffers of proof to the Secretary en camera every time an application is filed. Since the panel made no provision for hearing on such applications, the industry could easily be disadvantaged for the benefit of one member.

In this case, the right to claim age for distilled spirits is a valuable right which has an important influence on the purchase of whiskey by consumers (J.A., Vol. II, p. 99A). A retroactive decision in favor of Seagram would place the remainder of the industry in an untenable competitive position. As Seagram claims,^{5/} it would have a five-year advantage over the rest of the industry. During this period it could and would wring every last advertising advantage out of its claim

^{5/} J.A., Vol. II, p. 102A.

of age for neutral spirits. This would have an immediate and continuing adverse effect on the sale of all whiskey by other distillers including the petitioners herein.

Petitioners have lived with and up to the regulations for more than thirty years. They will continue to do so. They have no desire to support outmoded regulations which stifle technological advances merely for the sake of stability. They must, however, insist on their right to be heard before regulations are either applied contrary to their specific terms or other administrative actions are taken which would require extensive changes in their method of doing business.

CONCLUSION

The foregoing demonstrates that the questions presented go to the very heart of the administrative process. These considerations call for review by the Court en banc of the important questions raised.

For these reasons, petitioners respectfully request hearing before the Court en banc.

Respectfully submitted,

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CERTIFICATE OF COUNSEL
IN COMPLIANCE WITH RULE 26(a)

I hereby certify that the foregoing Petition for Rehearing En Banc is presented in good faith and not for delay.

/s/ Frank H. Strickler

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Attorney for Petitioners

February 5, 1965

